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Office of Administrative Law Judges
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Issue Date: 02 July 2004

Case No. 2003-AIR-0028

In the Matter of

MICHAEL R. CLARK,
Complainant

v.

PAGE AIRLINES, INC.,
Respondent

APPEARANCES:

Todd A. Richardson, Esq.
Christopher R. Taylor, Esq.
LEWIS & CAPPES
Indianapolis, Indiana
For the Complainant

Denis E. Jacobson, Esq.
Michael S. Fox, Esq.
TUGGLE, DUGGINS & MESCHAN
Greensboro, North Carolina
For the Employer

BEFORE: Robert L. Hillyard
Administrative Law Judge

DECISION AND ORDER

This case arises under the employee protection provision of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121, ("AIR 21" or "Act"). This statutory provision, in part, prohibits an air carrier, or contractor or subcontractor of an air carrier, from discharging or otherwise discriminating against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration (FAA) or any other provision of Federal law relating to air carrier safety.

The Findings of Fact and Conclusions of Law that follow are based upon my analysis of the entire record, arguments of the parties, and the applicable regulations, my observation of the demeanor of the witnesses who testified at the hearing, statutes, and case law. Each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. While the contents of certain evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformance with the standards of the regulations.

STATEMENT OF THE CASE

Michael R. Clark (hereinafter "Clark" or "Complainant") was employed by Pace Airlines, Inc. (hereinafter "Pace," "Respondent," or "Employer"), from April 13, 2000, until his termination on June 26, 2002. On September 1, 2002, Clark filed a complaint with the Department of Labor alleging that he was discriminated against for informing his Employer of several violations of FAA standards. His complaint was denied on April 1, 2003 by the Office of Safety and Health Administration (hereinafter "OSHA") and on April 29, 2003, Clark appealed that ruling and requested a formal hearing. The Complainant's allegation of discrimination under § 519 of AIR 21 was then referred to the Office of Administrative Law Judges for a hearing. A formal hearing was held before the undersigned in Greensboro, North Carolina, from January 13-16 and from January 21-22, 2004. The record was held open for 30 days after receipt of the hearing transcript, or until March 15, 2004, for the filing of closing briefs and a subsequent 15 days, or until March 30, 2004, for response briefs. Post-hearing and reply briefs were filed by both parties.

ISSUES

1. Whether Clark made a *prima facie* case of a violation of AIR 21;
2. Assuming that Clark did present a *prima facie* case, whether Pace presented evidence of a legitimate reason for termination;
3. Assuming that Pace presented evidence of a legitimate reason for termination, whether Clark met his burden of proof to show that he was terminated in retaliation for engaging in protected activity; and,

4. Assuming that Clark did meet his burden of proof, whether Pace established that it would have terminated Clark in the absence of protected activity.

CREDIBILITY FINDINGS

I have considered and evaluated the rationality and internal consistency of the testimony of all witnesses, including the manner in which the testimony supports or detracts from the other record evidence. In so doing, I have taken into account all relevant, probative, and available evidence, while analyzing and assessing its cumulative impact on the record. See, e.g., *Frady v. Tennessee Valley Authority*, 1992-ERA-19 at 4 (Sec'y Oct. 23, 1995) (citing *Dobrowolsky v. Califano*, 606 F.2d 403, 409-10 (3d Cir. 1979)); *Indiana Metal Products v. National Labor Relations Board*, 442 F.2d 46, 52 (7th Cir. 1971). An Administrative Law Judge is not bound to believe or disbelieve the entirety of a witness's testimony, but may choose to believe only certain portions of the testimony. See *Altemose Constr. Co. v. National Labor Relations Board*, 514 F.2d 8, 15 n. 5 (3d Cir. 1975).

I have based my credibility findings on a review of the entire testimonial record and associated exhibits with regard for the reasonableness of the testimony in light of all record evidence and the demeanor of the witnesses. Probative weight has been given to the testimony of all witnesses found to be credible. The transcript of the hearing contains the testimony of fourteen lay witnesses and two expert witnesses. I found each lay witness to be credible, and find that each lay witness presented a truthful representation of the facts in this case as seen from their particular employment position.

The Complainant offered the expert testimony of Peter A. Fisher, an accountant, on the alleged damages suffered by the Complainant as a result of his termination with Pace Airlines, Inc. The Complainant offered the expert testimony of Edward Malone regarding standard air traffic control procedures, some of the safety concerns raised by the Complainant, and on the incident aboard Pace Flight 111. I found both expert witnesses' testimony credible, and I note the Respondent's arguments regarding the qualifications of those witnesses and will weigh those objections appropriately in the Decision.

FINDINGS OF FACT

Background

1. Clark was born in May 1943 (Tr. 154).¹ He received a Bachelor of Arts degree from Indiana University and attended postgraduate studies in Management Science and Aviation Safety at Indiana University Graduate School, FAA Management Training School, and the FAA Academy (CX 53). Clark became a pilot in 1966 (Tr. at 12, 1127). Clark has the following aviation certificates: ATP with type ratings in A320, B727, B737, B707, MU300, BE400; Flight Engineer - Turbojet; rated in ASEL, helicopter and glider; Certified Flight Instructor with AMEL, ASEL, Instrument, Rotorcraft-helicopter, and glider ratings; Ground Instructor with Advanced and Instrument ratings; First Class Medical (CX 53). After working for the Defense Department for eight years (1965-1973), he joined the FAA (Tr. 13; CX 53). During 20 years with the FAA (1973-1993), Clark assisted airlines in solving safety and compliance problems, and he handled airline certifications, enforcement actions, accident investigations and in-depth inspections (Tr. 13-14; CX 53). In connection with accident investigations, he visited crash sites "[m]any times" (Tr. 14, 426). While working for the FAA, Clark maintained his currency as a pilot and continued to log flight hours (Tr. 157-59, 1127).

2. In 1993, Clark left the FAA to become an airline pilot (Tr. 13). From 1993 to 2000, he worked for four small airlines flying as a captain, serving as check airman, assisting in startups and restructurings, and writing standard operating procedures (Tr. 13, 166-68; CX 53). When he joined Pace in April 2000, Clark had logged nearly 10,000 hours of flight time and his pilot's license included type ratings in a variety of aircraft, including the Boeing 737 (Tr. 57, 158, 169; CX 53). In nearly 100 proficiency checks flying large aircraft during his years with the FAA and airlines, Clark did not fail a single test (Tr. 1127-28).

¹ In this Decision and Order, "CX" refers to the Complainant's Exhibits, "RX" refers to the Respondent's Exhibits, "Comp. Br." refers to the Complainant's post-hearing brief, "Resp. Br." refers to the Respondent's post-hearing brief, "Resp. Reply Br." refers to the Respondent's reply to the Complainant's post-hearing brief, "Comp. Reply Br." refers to the reply brief of Complainant Michael R. Clark, "Collins Dep." refers to the August 28, 2003 deposition of Tracey E. Collins, "Tyner Dep." refers to the July 31, 2003 deposition of Margaret Jane Tyner, "FoF" refers to a particular Finding of Fact paragraph, and "Tr." refers to the transcript of the January 2004 hearing.

3. Pace is a "supplemental" air carrier regulated under Part 121 of the Federal Aviation Regulations, as opposed to a "domestic" or "flag" carrier (Tr. 18, 651-52; CX 3). A supplemental air carrier operates as a charter carrier for hire transporting cargo or passengers. See 14 C.F.R. § 119.3.

4. In the late 1990s, Pace was a subsidiary of Piedmont Hawthorne and provided charter services to NBA sports teams (Tr. 16-17, 832, 1052-54). After Piedmont Hawthorne sold Pace in the Fall of 2001, business expanded substantially in 2002, particularly as a result of a substantial vacation charter contract (Tr. 56-57, 833, 1082). That vacation charter program now represents almost 70% of Pace Airline traffic (Tr. 1082). For Pace, 2002 was a record year in terms of number of passengers, and 2003 was better than 2002 (Tr. 1082). At the time of the hearing, Pace employed just under 400 employees (Tr. 1057).

5. Pace was the first "121" certificate air carrier to have an FAA approved safety action program, and is the only carrier in the industry that includes all employee groups in this program (Tr. 955-957).

6. In March 2000 the FAA inspected Pace's office paperwork for administrative compliance and stated that Pace's operating certificate should be immediately relinquished or suspended (Tr. 14, 849-50, 1054-55). No safety violations were discovered but there were problems with a lack of administration at the airline and with FAA required documentation (Tr. 1053-55). Through the intervention of an attorney, Pace was permitted to continue operations while implementing measures to correct compliance problems (Tr. 14, 849-50, 1054-55).

7. As part of that implementation, Pace brought in new management personnel, including Director of Operations Darren Zehner ("Zehner"), and Clark (Tr. 14, 16, 844, 850, 1055-56).

Captain Clark's Retention at Pace

8. Clark negotiated an agreement under which he would initially have the status of consultant (CX 1, 2; Tr. 16-17; RX 2). The title of consultant appeared to have more to do with the nature of his compensation than with his employment status with Pace. Clark was a full-time employee starting on April 13, 2000 (RX 4, p. 00010). This is confirmed by Pace employment paperwork, including an employment application, acknowledgment of the employee manual, and the W-4 Employer's Withholding

Allowance Certificate, all signed by Clark at the outset of his employment (RX 4).

9. Clark was hired as Manager of Standards/Fleet Manager (CX 1, 2, 5; Tr. 15, 21). He had responsibility for flight standards, check airmen, standard operating procedures, the Flight Standards Manual, coordinating with the Manager of Training and the Chief Pilot, and he also maintained currency as Captain and check airman, and flew as a line pilot (CX 1, 5; Tr. 20).

10. Check airmen are pilots authorized by the FAA to conduct training and proficiency testing of other pilots (Tr. 48, 167).

11. Standard operating procedures ("SOPs") are a set of procedures by which an airline operates their aircraft (Tr. 21). SOPs are required by FAA regulation and by Pace's General Operations Manual, the provisions of which become mandatory upon FAA approval (Tr. 21, 87-88, 426, 487, 853-55; CX 56). Standardization is an essential contributor to safety because uniform operations across departments and flight crews promotes coordination and efficiency and prevents confusion (Tr. 21, 426, 487-88, 855; CX 56).

Resistance at Pace to Capt. Clark's Efforts to Establish and Enforce Safety Standards

12. When Clark presented a compliance matrix to management personnel, showing department-by-department responsibility for compliance with particular regulations, Clark felt that a number of managers expressed anger and resentment (Tr. 23-24, 202-05). The matrix was ultimately adopted in an edited format. Clark provided no documentation or memorandum that chronicled the anger, resentment, or resistance that he allegedly encountered (Tr. 202, 205).

13. Another source of friction between Clark and Pace employees concerned FAA-mandated weight and balance procedures (Tr. at 30-32). Proper weight and balance procedures are important to safety because accurate calculation of weight distribution within the aircraft directly affects operational control over its flight capabilities (Tr. 30-31, 443-44, and 668). Proper weight and balance was one of the FAA's major concerns before Clark joined Pace, and Clark encountered repeated failures to follow the approved procedures (Tr. 31-32). In January and February 2001, Clark circulated three memoranda stressing the need to comply with mandatory weight and balance procedures and noting noncompliance (CX 10-12; Tr. 32-35).

Those communications were "PIDA" memos, indicating they were sent by e-mail to all management personnel at Pace (Tr. 18-19, 32-33, 80, and 274-75).²

14. Mr. Hopkins, a Pace Vice-President, admitted there was widespread resistance to following the weight and balance procedures proposed by Clark (Tr. 844, 863-64). He explained that while Clark's weight and balance procedure worked, "there were better procedures that were simpler, that were more effective, and arrived at just as safe conclusion for weight and balance operations than the one Mike [Clark] had prepared" (Tr. 863).

15. Memoranda prepared by Clark on January 11, 2001, and February 23, 2001, addressed additional flight standards problems occurring at Pace (CX 11, 12; Tr. 35-37). Clark reported a failure to follow SOPs for cabin calls and signals, instances where unqualified individuals were allowed to occupy a pilot's seat and to manipulate cockpit controls, failure to maintain and use approach charts, failure to conduct crew briefings, failure to maintain the aircraft logbook properly, and unauthorized individuals engaging in flight-related company communications (*Id.*).

16. After flying with Captain Sam Toler and observing what Clark described as repeated failures to follow required SOPs, Clark submitted a November 2, 2000, memorandum to Pace management personnel describing the problems and recommending a prompt line check and retraining of Capt. Toler (CX 21; Tr. 76). Capt. Toler responded to the memorandum denying Clark's accusations, and he then resigned from Pace (RX 7).

17. Clark reported in a January 2, 2001 memorandum to Chief Pilot Gilles and Director of Operations Zehner that he had observed Capt. William Tiedeman disregarding Pace SOPs and engaging in unsafe flight practices (CX 22; Tr. 76-77).

18. Clark wrote two memoranda dated January 4, 2001, to personnel in his department and Pace management concerning deviations from check airmen responsibilities and emphasizing the importance of accurate and timely reporting of training and testing events (Tr. 79-81; CX 24, 25).

19. Clark was a stickler for following the FAA-approved SOPs himself, and made every effort to encourage other Pace pilots to do the same (Tr. at 315, 379-80, 426, 487-88, 864, 885). His communication skills in conveying that encouragement

² The actual meaning of the "PIDA" designation is not in the record.

were lacking. Capt. Turner testified that while Clark was insistent on following standard operating procedures, the manner in which he went about trying to get people to comply unnecessarily created resentment (Tr. 885). The record contains the following words and phrases describing Clark: "dictator" (Tr. 388), "pain in the ass" (Tr. 380), "not much fun to fly with" (Tr. 388), "Yankee ass attitude" (Tr. 38), a belief that he was "God's gift to aviation" (Tr. 388), he "liked to hear himself talk" (Tr. 389), "intimidating" (Tr. 754, 782), "nitpicking shit" (Tr. 81), "believed he was always right and that's the way it was" (Tr. 918), "would tell first officers their opinion did not matter" (Tr. 391), "inconsistent" (Tr. 790), "hard to talk to" (Tr. 870), "antagonist" (Tr. 838-841), "his way or the highway" (Tr. 917), "arrogant" (Tr. 388), "always thought he had the answer and always thought he was right" (Tr. 389), "alienated a lot of people" (Tr. 391), and "a micromanager" (Tr. 391). Captain Holt testified that Andy Bradford and Mark Shue might have referred to Clark as a "pain in the ass" (Tr. 380). He qualified that declaration, however, stating that he couldn't remember any particular incidents when that comment was actually made and that it "probably" was Andy Bradford and Mark Shue that made the comment (Tr. 380).

20. Clark asserts that Capt. Shue resisted use of the FAA approved SOP's (Tr. 61-62). Shue denied that allegation (Tr. 923-924). Clark produced no memorandum or documentation showing resistance by Shue or any member of Pace management to safety proposals (Tr. 201, 205, and 206). Clark testified that he worked successfully with many Pace personnel to improve the safety of the airline (Tr. 21-22, 199, and 850-51). Pace passed an FAA inspection conducted in January 2001 (*Id.* at 19, 22, 199-201; CX 4, 6).

May 2000 Sexual Harassment Claim Against Clark

21. Clark received a May 4, 2000, letter from Vice-President Hopkins stating that he had been accused of sexual harassment by two female employees (RX 5; Tr. 148). Ms. Taylor lodged a complaint about Clark with Ed Volker, and through him, with Jim Hopkins (Tr. 828-829). Ms. Taylor and Ms. Hull were summoned by Mr. Hopkins to discuss the situation in his office (*Id.* at 809-10, 813, and 829). The primary concern related to gifts of candy they had received with drawings of small animals (Tr. 808-09, 825; CX 54).

22. Clark explained that the gifts were given by his wife shortly after Secretary's Day to several female employees who had assisted Clark, and that the animal drawings were a custom

in his family (RX 5(a); Tr. 148, 228-29, 838, and 852). He denied the other accusations in Mr. Hopkins' letter (RX 5(a); Tr. 219-26).

23. Mr. Hopkins told Clark the matter was closed and would not be raised again (Tr. 148, 231-32). Clark testified that his termination was not related to the sexual harassment claim (Tr. 149).

The New York Operation

24. One of the aircraft operated by Pace was owned by Madison Square Garden and was used to transport the New York Knicks and the New York Rangers, as well as corporate executives and others (Tr. 38, 839).

25. The New York operation was using procedures that were not in Pace's mandatory standard operating procedures (Tr. 39-40, 490, 839, 853). Clark was assigned to fly the New York operation in order to promote safety and compliance with SOPs (*Id.*).

26. On a March 1, 2001 flight piloted by Clark (as Captain) and Capt. Scherrer (as First Officer), the lead flight attendant failed to respond to several required cabin calls as the aircraft made its approach for landing (CX 13; Tr. 41-42, 260-62, and 492-93). Without notification as to whether the passengers were seated and the china and silverware put away, and believing the cabin was not secure, Clark elected to do a "go around" and return for a safe landing when the status of the cabin could be determined (CX 13; Tr. 41, 262-64, 492-93, 506, 669, 839-40). Clark reported the failure to follow required procedures for cabin calls to Director of Operations Zehner and recommended that the lead flight attendant be retrained (CX 13; Tr. 41-42).

27. Clark was also involved in the New York operation in his capacity as manager of check airmen³ (Tr. 48). In March 2001, Clark received a report about a pilot for the New York operation that gave him serious safety concerns (Tr. 48-49). Clark scheduled a line check that he himself would conduct as check airman (Tr. 49-50). Hopkins and Zehner determined that a line check was not necessary under the circumstances (Tr. 862). Hopkins directed Clark not to go and instead he assigned Joe Travis, the Director of Safety (Tr. 860-862), to review the situation (Tr. at 51-51). Travis did not have pilot status at

³ See FoF ¶ 10.

Pace, had not gone through training on the required Pace SOPs, and was not an FAA-authorized check airman (*Id.*).

28. When recurring safety concerns at the New York operation persisted, Director of Operations Zehner requested that Clark put the problems in writing as a stimulus to corrective action (Tr. 40, 42-43, 367). On March 6, 2001, Clark sent a letter to Zehner describing in detail noncompliance and safety problems with the New York operation (CX 14; Tr. 42-44). He recommended that the entire operation be thoroughly reviewed (*Id.*).

29. Clark was removed from the New York operation (Tr. 45, 491, 842).⁴ The customer, Madison Square Garden and the New York Knicks, requested his removal (Tr. 270-71, 842, 856-57). Pace had operational control over the aircraft and by regulation had the authority to determine crew assignments (*Id.*).

30. Clark met with Hopkins and Director of Operations Zehner, and Hopkins confirmed that Clark was no longer to be involved in the New York operation (Tr. 45-46). Hopkins testified that:

I think it is important to note that the manuals that Mike [Clark] brought to the table were very good. We were all very impressed with them. The problem that we had in New York was that we needed to implement our standard operating procedures with someone who could effect the change without antagonizing and disrupting the operation. There were several situations in which Mike [Clark] was involved that although he was trying to implement the correct procedures, he simply antagonized the whole operation (Tr. 838-841).

31. Clark testified that his removal from the New York operation was not connected to his safety complaints "in any way that I can think of" (Tr. 254-55).

32. Clark felt that his removal from the New York operation was a blow to his prestige and reputation, and that it undermined his authority and effectiveness as manager of standards (Tr. 45-47, 272). Clark did not receive higher pay while he was a pilot at New York (Tr. 272).

⁴ The exact date of Clark's removal from the New York operation is not in the record. The removal, however, occurred before Clark's transfer from management to a floater pilot position in May 2001.

The Boeing 757 Training Incident

33. In early 2001, Pace secured a contract to operate a Boeing 757 aircraft for the Dallas Mavericks basketball team (CX 4, 6; Tr. 68-69). The 757 was undergoing reconfiguration and was expected to be ready by July 2001 (CX 6). The 757 was new to Pace, and was not an aircraft in which Clark was type-rated (*Id.*). The training class for the Boeing 757 was conducted by an outside group, not by Pace (Tr. 470-471). In anticipation of crew requirements, Pace issued a March 7, 2001 memorandum addressing the upcoming 757 crew needs (CX 6). In part, that memo stated that:

If you are interested in joining the 757 team, please update your resume and forward it via fax, mail, or e-mail to us. ... We have not yet addressed specifics concerning the 757-crew requirements. However, the Maverick's have told us they look forward to reviewing your resumes for consideration.

(CX 6).

34. Clark presented no evidence that he submitted his resume or that the Mavericks wanted him as a pilot. Clark testified that he had been told that he and Capt. Gillis would be in the first class to be trained on the 757, and Clark considered that to be a very valuable training opportunity (Tr. 69). Specifically, he testified that:

The company needed two pilots to go train on [the 757] and become the first two manager pilots. And they counseled with each other and decided who would - - who could they send that could do their job here and do that as well, and then assimilate it well enough to teach other pilots and building initial - check airmen, and so forth, even though it was new to them. While still being managers and they selected myself and Capt. Gillis, the chief pilot (Tr. 69).

Shortly after Clark was removed from the New York operation, Director of Operations Zehner allegedly informed Clark that he would not be a part of the upcoming training for the 757 (Tr. 69-70). In the Pace March 7, 2001 PIDA memo (CX 6), Pace announced that Capt. Gillis was stepping down as chief pilot.

The Misfueling Error and the Anonymous Hotline Complaint Targeting Capt. Clark

35. On March 10, 2001, Clark was a pilot on a flight from Huntsville, Alabama to Laughlin, Nevada (Tr. at 359-60). Prior to departure, there was considerable difficulty with the company providing fueling services, which had misfueled the aircraft (Tr. 360-61). Because they were focusing on a problem with the wing tanks, neither Clark nor the first officer noticed that the center tank had not received the amount of fuel ordered (Tr. 361-62). Early in the flight, the pilots took a fuel score and discovered that the center tank had been misfueled (Tr. 362). The misfueling resulted in less fuel than required by FAA regulation (Tr. 243-44). Taking into account variables such as altitude, temperature, and wind conditions, Clark determined that the plane had sufficient fuel to reach the destination but not with the full reserves required by regulation (Tr. 243-44, 362-63). Clark then made an unscheduled fuel stop in Albuquerque, New Mexico (Tr. 363-64).

36. Clark promptly informed Director of Operations Zehner and Chief Pilot Turner (Tr. 364-65, 883-84). Clark recommended that Pace self-disclose the incident to the FAA. Clark testified that Director of Operations Zehner and Chief Pilot Turner disagreed (Tr. 364-65). Clark submitted a NASA report pursuant to a program by which pilots may disclose violations and avoid FAA enforcement (*Id.* at 89, 374). Clark was not disciplined by Pace in connection with the misfueling error and, in fact, was praised by Chief Pilot Turner for handling it properly (*Id.* at 146-47, 365).

Anonymous FAA Complaint Against Clark

37. Clark was the subject of an anonymous FAA hotline complaint on March 19, 2001, which raised the misfueling situation as well as allegations that Clark incorrectly turned onto a dead end taxi way, bullied and intimidated other pilots, and flew while on pain medication (RX 23; Tyner Dep. Ex. 1; Tr. 146, 235-38).

38. As a result of that complaint, the FAA withdrew Clark's check airman status pending proceedings that, to date, have not been completed (Tr. 147, 248). Director of Operations Zehner responded to the hotline complaint on behalf of Pace, and stated:

As you are aware, Pace Airlines has undergone a major management change and is providing new direction in order to become a fully compliant, standardized and

professional organization. Per my direction Captain Clark has made several additions and changes to our operating procedures and practices. Also per my direction, he has required that these practices and procedures be followed as much as possible in order to maintain our safety and compliance. As you can imagine, this is a very difficult and thankless job.

(CX 7).

Clark testified that his termination had nothing to do with this anonymous FAA Complaint (Tr. 147).

Capt. Clark's Change to Full-Time Employee Status

39. When Clark was hired under the title of Consultant in April 2000, he was paid a daily rate without benefits (CX 2). Clark was given an option to become a regular salaried employee with benefits which had to be exercised by Clark no later than July 1, 2000 (CX 2; RX 2). The record does not reflect that Clark exercised that option by July 1, 2000. Clark later attempted to exercise that option repeatedly without success, making numerous oral requests and then written requests in November 2000 and March 2001 (CX 15, 16; Tr. 54-56). Clark was changed from a per-day rate to a full-time salaried position when he transferred to become a floater pilot⁵ effective May 7, 2001 (RX 4, p. 00010). Clark's next review was scheduled for May 1, 2002 (RX 4, p. 00010). Clark's base was initially designated as Indianapolis (where he lived) (CX 19). His base was subsequently changed to Cincinnati, forcing him to incur the time and expense of commuting to Cincinnati (Tr. 74-75, 369-70).⁶ Pace Vice-President Hopkins testified that Zehner had inappropriately allowed Clark to be based out of Indianapolis (Tr. 845). Specifically, he stated:

I had some real heartburn with the fact that Darren Zehner had allowed Mike to be based out of Indianapolis. Our policy was that pilots were based ... where an aircraft was.... If you had - if your airplane was in Baltimore ... that's where you initiated your day. ... Darren had coalesced with, to Mike that he would pay him, make his base in Indianapolis and start his expenses from there. It wasn't a good business

⁵ A floater pilot at Pace was not assigned to a particular aircraft, but rather flew at the company's discretion wherever a pilot was required. Pace paid pilot expenses from the pilot's base to wherever he was assigned to fly and then back to the base again (Tr. 369-70).

⁶ The base transfer date from Indianapolis to Cincinnati is not contained in the record.

practice. It wasn't something that we allowed others to do. And we - it was something that I had asked Darren to address with Mike.

(Tr. 845).

Chief Pilot Turner spoke out against Capt. Clark at the time he went from being a consultant to a salaried employee in May 2001 (Tr. 869). Turner testified that he "did not feel that Mike [Clark] was good for the company." (Tr. 869). Turner had never flown with Clark on the line, but numerous pilots had complained about Clark and stated that he was hard to talk to (Tr. 869). Turner testified that his recommendation was not in any way influenced by any concerns that Clark may have expressed about safety (Tr. 869).

Clark's Involvement with Training at Pace

40. In 2001, Pace added a new type of Boeing 737 to its certificate, the 737-300 (Tr. 57). Pace initially started operating a single Swiss-owned 737-300 aircraft (Tr. 57-58). Clark was the only Pace pilot experienced with the 737-300, and he was qualified to train other Pace pilots (*Id.*). The need for pilots trained on the 737-300 later expanded greatly when Pace negotiated a contract with Vacation Express to engage in substantial vacation charter operations using 737-300 aircraft (Tr. 56-58, 293).

41. During a training session on the 737-300 in Winston Salem, North Carolina, Clark had a confrontation with Capt. Shue after Capt. Shue and Capt. Bradford missed a portion of the ground school prior to scheduled simulator training (Tr. 59-61). Clark considered it essential to teach the airplane systems and procedures before spending simulator time practicing those systems and procedures (Tr. 60). Capt. Shue had missed a portion of the ground school because of his ongoing duties with Pace (Tr. 919). Capt. Shue took offense when Clark insisted on completing the ground school before proceeding to simulator training (Tr. 920). Capt. Shue acknowledged the incident and admitted that he disagreed and was upset with Clark's insistence on making up the missed items (Tr. 921). When Zehner and Turner instructed Shue to complete the ground school, Shue complied. (Tr. 921). Capt. Shue was upset that Clark had not mentioned the alleged deficiency to Shue before they had set up simulator training and before they had flown from Winston Salem to the simulator facility in Seattle, Washington, to complete the final portion of the training (Tr. 920).

During another simulator session, Clark was performing a standard designated emergency procedure when Capt. Turner insisted upon deviating from that procedure (Tr. 868, 877-878). Turner testified that under the simulator conditions presented, he "felt like we were in survival mode" and he differed in opinion from Capt. Clark as to what was required to correct the problem (Tr. 868).

42. Clark's efforts to ensure that Pace pilots were properly trained generated animosity with Director of Marketing James McPhail (Tr. 51). In March 2001, when Clark responded to a training comment made by McPhail by jokingly stating that Pace should have more training, McPhail allegedly called Clark a "rotten son of a bitch" and angrily complained that all the training requirements made it harder to sell a charter, set up a schedule, and go fly it (Tr. 51-53). When Clark retreated to his own office, Clark testified that McPhail followed him to his desk and continued to berate him, saying he wanted Clark to go back to Indiana and never come back (*Id.*).

43. The pilots trained by Clark on the 737-300, including Capt. Shue, demonstrated the required proficiency to meet FAA standards (Tr. 63).

44. Subsequently, several Pace pilots who had not been trained by Clark failed to demonstrate the necessary proficiency to meet FAA standards (Tr. 64, 440-42). The FAA threatened to shut the training program down unless the FAA became satisfied that the Pace pilots would be properly trained and could pass their proficiency reviews (Tr. 64-65, 436-37).

45. If the training program had been shut down, Pace would have experienced difficulty achieving the business expansion represented by the Vacation Express contract (Tr. 65).

46. Director of Operations Zehner and Director of Training Smith approached Clark for assistance in addressing the training issue (Tr. 64-67).

47. Clark successfully undertook a series of projects to complete the training and other operational requirements for the Vacation Express contract (Tr. 71-73, 439). The pilots trained by Clark were able to demonstrate the required proficiency to meet FAA standards (*Id.*)

48. Clark was later removed from the training function and did not train additional Pace pilots (Tr. 73). Capt. Shue, Pace's Manager of Training, testified that Clark ceased doing training at Pace when it was determined by Pace management that

all training should be conducted by personnel who were qualified as check airmen by the FAA (Tr. 931-932). Clark's check airman status had been revoked by the FAA pending an investigation of the March 2001 FAA hotline call (Tr. 147, 248).

Capt. Clark's Logbook Write-Ups and Hotline Complaint
Regarding Maintenance and Training Violations

49. As a pilot for Pace, Clark encountered a normal variety of equipment failures and malfunctions and, pursuant to FAA regulation, he recorded such problems in the plane's logbook (Tr. 94, 97-99, 379).

50. Maintenance personnel at Pace are reliant on pilots to alert them to mechanical problems (Tr. 550). When mechanical irregularities are recorded in the logbook, there is a requirement that maintenance either fix the problem or defer it in accordance with a minimum equipment list (Tr. 97, 302-03, 550-52).

51. In some instances, Clark faced recurring problems after multiple logbook entries indicating that equipment problems persisted after being logged (Tr. 94-97, 379). There were repeated failures in a flight management computer system on one plane that had been written up several times by Clark and two other pilots (Tr. 95, 301, 553-56, 571-72). Mr. Wood, Pace's Manager of Avionics testified that his team of mechanics attempted to correct the problem using test equipment built into the computer module, but the mechanics could not find the problem using the test equipment and the malfunction could not be duplicated by the mechanics (Tr. 554). On another plane Clark made multiple logbook entries of an autopilot that pitched up when approaching the ground (Tr. 95-96, 303, 556-57).

52. Clark testified that he felt belittled and ostracized for making logbook write-ups but didn't elaborate as to whom in Pace management made him feel that way (Tr. 81). Maintenance personnel, at times, would refer to his write-ups as "Mike Clark problems" (Tr. 553-54). Clark testified that he felt strong pressure not to record equipment problems as Pace was a small airline with a limited supply of parts and trained mechanics, but did not elaborate as to whom in Pace management was applying the pressure (*Id.* at 94, 97-99). Mr. Wood, Pace's Manager of Avionics, testified that the maintenance workers' reference to a "Mike Clark problem" represented frustration by the maintenance crew with the difficulty in finding solutions to ongoing problems on aircraft with recurring logbook entries by Clark, and not to frustration towards Clark himself (Tr. 554).

53. Clark had concerns about the training Pace pilots were receiving (Tr. 92-93). Capt. Shue was Manager of Training (*Id.* at 914). Clark felt that training records had been falsified to state that required training functions had been completed when they had not, that proficiency checks that should take hours were completed in 15 or 20 minutes, that recorded simulator time was considerably greater than actual simulator usage, and that specific items required for proficiency tests were ignored (*Id.* at 92-93).

54. Clark placed a call to the FAA hotline in late 2001 regarding his training and maintenance concerns (Tr. 97, 99). While such calls can be made on an anonymous basis, Clark provided his name and telephone number (*Id.* at 100, 304).

55. Capt. Shue reviewed the simulator records, training sheets, and the hour meter on the simulator referenced in Clark's FAA complaint and found no falsification (Tr. 929-30). Shue forwarded all of the relevant records to the FAA, which found the documentation acceptable (*Id.*).

The Removal of an Emergency Procedure from Aircraft Manuals

56. In his capacity as Manager of Standards/Fleet Manager, Clark undertook the preparation of a Flight Standards Manual (Tr. 25-26, 196-98).

57. FAA regulations require a manual or set of manuals setting forth operating procedures applicable to a given type of aircraft, and Clark created a Flight Standards Manual to serve that purpose (Tr. 25-26, 196-198).

58. The Flight Standards Manual was reviewed and approved by the FAA and, upon approval, its contents became mandatory requirements (Tr. 25-26, 290).

59. Clark registered a copyright as author of that manual, and granted Pace a license to use the manual in its internal operations subject to a requirement that it be reproduced in full and without omitting any copyright notices (Tr. 26-28, 286-87; CX 9).

60. In February 2002 Clark became aware of an unauthorized deletion from the Flight Standards Manual when a warning light was activated during a passenger flight, indicating a failure in the cargo fire suppression system (Tr. 28-30). Clark asked the first officer to consult the procedure in the Quick Reference Handbook, which contains emergency procedures and is derived from a chapter in the Flight Standards Manual (*Id.*). The

applicable procedure, however, was missing from the Quick Reference Handbook (*Id.*). Clark then asked the first officer to refer to the Flight Standards Manual, where the emergency procedure should also have been located, but it had been removed from that manual as well (*Id.*). The emergency procedure had been replaced with a note directing the pilots to consult a different manual (*Id.*). Clark handled the warning light based on his memory of the system and wrote up the irregularity in the logbook (*Id.*).

61. Clark reported the problem to Chief Pilot Turner and Director of Safety Cobert (Tr. 29-30). Clark alleges that when he raised a complaint regarding the improper removal of the emergency procedure from airplane manuals, Cobert exhibited a lack of understanding and a lack of interest (Tr. 29-30). Cobert responded by issuing a memorandum with a priority of urgent (Tr. 963-64; RX 27). The memorandum stated that the replacement of the regulations in the Quick Reference Manual and Flight Standards Manual was a top priority (RX 27). The next time Clark flew the plane there was a memorandum on the glare shield noting the deletion and stating the emergency procedure would be replaced in the Quick Reference Handbook (Tr. 30; RX 27).

The February 2002 Duty Time Violation

62. In February 2002 Clark and Capt. Holt were the pilots on a Pace flight which was delayed due to a security threat in Mexico (Tr. 83-84, 378). The delay put both pilots in a situation where they could not complete the remaining leg of the flight without exceeding the 16-hour workday maximum imposed by FAA regulation (*Id.*). The pilots contacted Pace raising their concern, and were told that the company had a legal interpretation stating that the trip would be legal because the delay was beyond the company's control (Tr. 84, 378). The pilots both expressed their reluctance, but were pressured to take the flight anyway (*Id.* at 84-85, 378).

63. Clark contacted Mr. Spence, Pace's Manager of Flight Following, who also insisted there was a legal interpretation permitting deviation from the regulation (Tr. 85). Clark contacted Director of Operations Zehner to discuss the situation (*Id.* at 85-87). Zehner continued to rely on the referenced legal interpretation, although Clark believed it applied to domestic rather than supplemental operations (*Id.* at 86).

64. Clark refused to take the flight until Zehner faxed to him a handwritten letter stating that the flight was legal based on the legal interpretation and expressly revising a provision

in Pace's General Operations Manual that would also have prohibited exceeding the duty time (Tr. 86-87; CX 26). When Zehner did so, the pilots agreed to take the flight and in doing so exceeded the 16-hour duty time limitation (Tr. 88, 378-79).

65. After the flight, Clark contacted Chief Pilot Turner and Director of Safety Cobert (Tr. 88). Clark suggested that Pace self-disclose the circumstances to the FAA (*Id.* at 88-89). Clark stated that Cobert scoffed at his concerns and said nobody but the two pilots knew about it and nobody is ever going to know about it (Tr. 89-90). Cobert testified that he advised Director of Operations Zehner that "we needed to file a voluntary self disclosure with the FAA with regards to the event and he advised me at that time he would take care of that." (Tr. 965). Cobert denies that he told Clark that no would ever find out about the event and he testified that he encouraged Clark to file a NASA report (Tr. 966-67).

66. Both Clark and Capt. Holt submitted a NASA report concerning the duty time violation (Tr. 89-90, 379; CX 27). Clark notified Mr. Cobert that he was doing so (Tr. 90).

67. At trial, Mr. Cobert agreed that the legal interpretation was inapplicable and that the flight did violate the regulation (Tr. 965). He denied that he opposed self-disclosing the matter to the FAA and stated that he advised Zehner to do so and was surprised during an internal audit conducted months later to discover the self-disclosure had not occurred (Tr. 965-66, 1043-47). Cobert then filed the self-disclosure himself (Tr. 966).

The Change of First Officers on Pace Flight 111.

68. On June 21, 2002, Clark was assigned to serve as pilot-in-command of a flight from Cincinnati, Ohio, to Sanford, Florida (Tr. 101-03, 307, 380-81, 715-16, 774-77). Another Pace flight was diverted to Cincinnati and was also going to Sanford (*Id.*). The Captain on the diverted flight, however, had a duty-time problem and could not complete the leg to Sanford (*Id.*). Clark was assigned to take that flight (*Id.*). Outbound, it was Pace Flight 111 (*Id.*).

69. The first officer originally assigned to Pace Flight 111 was Capt. Watkins (Tr. 103, 776-77). Clark had flown with Capt. Watkins as his first officer on one earlier occasion (*Id.* at 103, 752). There were incidents from that previous flight that prompted Clark to have safety concerns about Capt. Watkins' abilities (*Id.* at 103-09; CX 31).

70. As part of his pre-flight preparations, Clark attempted to make a PA announcement to the passengers, but when he picked up a microphone and started to speak Capt. Watkins told him the microphone did not work (Tr. 109-10, 309-10, 780, 800-01; CX 30, 31; RX 16). Clark then picked up another microphone and started to speak and Capt. Watkins stated the entire PA system was inoperative (*Id.*). Clark believed Capt. Watkins withheld safety information in order to get the airplane moving by encouraging him to accept the airplane as having no problems (Tr. 318-19). Watkins told Director of Safety Cobert that Clark had attempted the PA announcement before asking Watkins if there were any problems with the aircraft (RX 16).

71. When Clark did inquire about the status of the airplane, Watkins understood Clark's question to be an inquiry as to any problems with the airplane that were not already logged in the aircraft log book (Tr. 780). She told Clark that there were no problems with the airplane and she had it ready to go (*Id.* at 109, 308, 779-80, 799-800; CX 30, 31).

72. As a standard practice, most captains would review dispatch releases and the aircraft log book as part of their pre-flight preparation (Tr. 778). This review gives the captain a current look at the airplane, including any outstanding mechanical items that have been written up and properly deferred (Tr. 778-79).

73. An inoperative PA system is a safety concern because proper communication between the pilots and the flight attendants and passengers is essential (Tr. 110, 313). The PA system on Pace 111 had been inoperative for three or four days prior to June 21, 2002 (Tr. 110). The problem with the PA system on Pace 111 was properly noted in the aircraft log book (Tr. 775). An inoperative PA is a deferrable repair, provided it is corrected within a specified period and further provided that the captain establishes alternative communication procedures with the flight attendants (Tr. 110-11).

74. Clark summoned the lead flight attendant, Ms. Lynn, to the cockpit to brief her and Watkins on the required alternative communication procedure (Tr. 111, 311-12, 719-20, 780-81; CX 30, 31; RX 16). Clark attempted to propose a procedure using chimes (Tr. 322, 720, 781-82). Ms. Lynn was confused by the proposal because the number of chimes proposed by Clark was the same as an emergency chime signal she had learned in training; however, she did not ask any questions or voice her concerns (*Id.* at 720-22, 727-32, 801-02). Capt. Watkins interrupted Clark twice during his proposal and tried to describe the alternative

communication procedures used by previous captains and crews who had already flown with the inoperative PA (*Id.* at 111, 722-23, 781-83, 802-03; CX 30, 31; RX 16). Clark responded to Watkins' interruptions by authoritatively stating to Watkins that she would speak only when spoken to (Tr. 722, 782). Clark then took Ms. Lynn out onto the jet bridge to complete the briefing (Tr. 111, 723-25, 783, 786-87).

75. In response to the pre-flight events between Clark and Watkins, Clark contacted Pace crew scheduling and arranged to switch first officers with the flight he was originally assigned to fly (Tr. 112, 725-26, 787-88; CX 30, 31). He spoke with Capt. Watkins and they made plans to talk further about their differences in Sanford (Tr. 112, 319-21, 788). Capt. Holt then came over from the other aircraft to become the first officer on Pace Flight 111 (Tr. 114, 380-81, 725).

76. Capt. Watkins flew with Capt. Scherrer from Cincinnati to Sanford, Florida, without incident (Tr. 500-01, 509).

77. Clark was required to submit to an escorted drug test when he arrived in Sanford and he did not have the planned follow-up conversation with Capt. Watkins (Tr. 320-21). That same day he prepared and submitted separate memoranda to Chief Pilot Turner and Director of Safety Cobert, describing the circumstances that led to the exchange of first officers (Tr. 112-13, 321; CX 30, 31).

The Loss of Air Traffic Control Radio Communications on Pace Flight 111 on June 21, 2002

78. The Boeing 737-300 aircraft used for Pace Flight 111 was equipped with two communications radios (Tr. 114-15, 430, 497, 1072). "Comm One" was used for air traffic control ("ATC") communications and "Comm Two" was used for company communications and other purposes (Tr. 114-15, 430-31, 497, 1072, 1107, 1114).

79. As a standard practice, one pilot would fly the plane and the other pilot would handle radio communications (Tr. 114, 429, 497, 658). On Pace Flight 111, Clark was the flying pilot and Capt. Holt handled radio communications (*Id.* 114, 336, 381, 397; CX 44).

80. Federal regulations require that airlines maintain the capability of communicating with their flights independent of communication channels used by ATC (Tr. 115, 897-98, 1130). Pace contracted with an entity called Atlanta Radio (also known as "Delta Radio") to provide communications services in the

continental United States (*Id.* at 115-17, 526-27, 660-61, 905, 1107; CX 32). For communications outside the continental United States, Pace contracted with ARINC, a leading provider of such services to airlines (Tr. 116-17, 526-27, 660-61, 986-87; CX 32). Pace did not, and was not required to inform ATC concerning its contractual arrangements for communicating with its flights (Tr. 527, 986-87, 1012).

81. The plane used for Pace Flight 111 was also equipped with a SELCAL⁷ system (Tr. 120, 1072). The SELCAL system is capable of utilizing a four-digit code unique to a particular aircraft to activate an alarm chime and a warning light in the cockpit, thereby alerting the crew to a desired communication (*Id.* at 119, 430, 497-98, 657; CX 33). One of the purposes of SELCAL systems is to relieve the pilots of the need to monitor the Comm Two radio, which would otherwise be a source of potentially distracting chatter and static (*Id.* at 119-20, 430-31, 497-98, 657-58, 1107-08; CX 33). Pace pilots customarily did not monitor the Comm Two radio if a functional SELCAL system was installed (*Id.* at 120, 431, 498, 657-58, 660, 880, 1107).

82. The SELCAL system operates on the same radio frequency as the Comm Two radio, and that frequency must be adjusted from time to time as the flight passed into different geographical regions, as shown on a map included in the Pace General Operations Manual (Tr. 118-19, 943; CX 32). A laminated card is maintained in the cockpit which reflects a map of the different areas and applicable frequencies (RX 21; RX 22; Collins Dep. 16-17, 60-61).

83. When Pace 111 took off from Cincinnati it was in airspace controlled by the Indianapolis Air Traffic Control Center (Collins Dep. 54-55). As Pace 111 flew south it left Indianapolis Center's airspace and entered Atlanta Center's airspace (*Id.*).

84. During Pace Flight 111, Clark testified that he made the necessary SELCAL frequency changes (Tr. 337). After the flight left Cincinnati, he used the Comm Two radio to call back to Cincinnati operations pursuant to standard procedure and then turned down the volume on the Comm Two radio (*Id.* at 120, 1142-44). As the flight proceeded, he testified that he made the adjustments to keep the Comm Two radio and SELCAL system on the correct frequency (*Id.* at 120-21, 1027-28, 1143-44, 1154).

85. The Comm One radio, used for ATC communications, also required frequency adjustments from time to time, but unlike the

⁷ SELCAL refers to a brand name of communication decoders.

Comm Two radio, the changes for Comm One were not made at the instigation of the pilot by reference to a map (Tr. 121-22, 337-38). The air traffic controller in the airspace being departed institutes an automated transfer of data on the aircraft to the air traffic controller for the airspace being entered (RX 22; Collins Dep. 8-9, 33-37). ATC personnel from the departing ATC would then initiate a frequency change by contacting the flight and providing the frequency to contact the new ATC center, which is known as a "handoff" (Tr. 121-22, 337-38, 520, 658). The pilot or first officer on the aircraft is then supposed to acknowledge, change the frequency, and contact the new air traffic control center on the frequency provided (RX 22; Collins Dep. 8-9).

86. In addition, airspace controlled by a given air traffic control center is often divided into various sectors (RX 22; Collins Dep. 33-36). In busy centers, such as Atlanta, it is necessary to change frequencies and contact a new controller each time an aircraft moves from one sector to the next (RX 22; Collins Dep. 33-36, 61).

87. The Atlanta Center's airspace is one of the busiest areas in the country (RX 22; Collins Dep. 55). The airspace controlled by Atlanta Center includes eastern Tennessee, western North and South Carolina, the northern three quarters of Georgia, and most of Alabama (RX 22; Collins Dep. 36).

88. When Pace 111 left Indianapolis ATC Center, it failed to establish communications with Atlanta ATC Center (RX 22; Collins Dep. 9-12). Pace 111 passed through four or five sectors of the Atlanta ATC center without making contact (RX 22; Collins Dep. 59). Atlanta ATC made numerous attempts over a 26-minute period to regain radio contact with Pace 111 (RX 22; Collins Dep. 13-21, 49-61; RX 13, 14, 15).

89. Tracy Collins, Operations Manager for the Atlanta Center, testified that Pace 111 transited the entire Atlanta Center airspace without communicating in any way (RX 22; Collins Dep. 49-51, 63). Ms. Collins testified that she had never encountered any other aircraft other than Pace 111 that had flown NORDO (no radio contact) through the entire airspace of the Atlanta Center (RX 22; Collins Dep. 66).

90. It is not uncommon for a handoff between control centers to be missed by an aircraft. A missed handoff is something that happens occasionally to all experienced pilots (Tr. 122, 432-33, 499, 659). There are several potential causes for a missed handoff, such as ATC personnel delaying handoff communications until the plane has flown out of radio range,

gaps in radio coverage, problems with communications equipment, and pilot error (*Id.* at 122, 432, 498-99, 659).

91. There was a missed handoff on Pace Flight 111 as the plane left the airspace of the Indianapolis ATC center and entered that of the Atlanta ATC center (Tr. 329, 382, 894-95; CX 37). Neither the cause nor the precise location of the missed handoff is known (Tr. 335, 348-49, 498-99, 659, 700, 705-06; CX 37, 38, 44). Capt. Holt monitored the Comm One radio throughout the flight and he continued to listen on the last known assigned frequency and continued to hear chatter on Comm One (Tr. 121, 339, 372, 382). He did not realize that a handoff had been missed (*Id.* at 412; RX 17).

92. When Pace Flight 111 did not check in on the new frequency, ATC personnel in Atlanta attempted to regain contact (Tr. 331). Tracy Collins testified that standard Atlanta ATC procedure is to accept the automated handoff of an aircraft from another ATC center and then wait for the aircraft to check in with Atlanta ATC (Tr. 539). If the aircraft does not check in within approximately one minute, several attempts are made to establish contact with the new aircraft (Tr. 540). Standard ATC communication procedures include calling back to the Indianapolis center to attempt communication on the previous frequency, contacting other flights in the area that may be able to make contact on the previous frequency, calling ARINC⁸ in the event the airline subscribes to its services, and contacting the airline for assistance (Tr. 331, 521-22, 525, 540-42, 703-04, 986-87; RX 14, 22; Collins Dep. Ex. 1 at § 10-4-4). If contact is still not accomplished, the ATC controller will contact his/her supervisor (Tr. 541). If the problem meets certain criteria, it must be logged into the ATC Watch Book for that shift (Tr. 542).

93. Collins does not know if other aircraft were asked to attempt communications with Pace 111 while it was out of radio contact (Tr. 542).

94. Collins saw no reason to declare an emergency on Pace 111 (Tr. 542). Other than a lack of communication, there was normal handling of the aircraft, meaning the flight did not deviate from its flight plan (Tr. 543). There was no written record of Pace 111 in the log at the ATC Watch Desk (Tr. 543).

95. In an attempt to reach Pace 111, a telephone call was placed by Atlanta ATC to ARINC. Atlanta ATC personnel were unaware that Pace used ARINC for international flights and

⁸ See FoF ¶ 80.

Atlanta Radio for communication services within the continental United States (Tr. 526-27; RX 14). Ms. Collins also called Pace for assistance (Tr. 523-24, 528, 537).

96. The Pace flight follower handling Pace 111, Mr. Piercy, learned of the loss of ATC communication when he received a call from ARINC in San Francisco (RX 13; Tr. 123, 905-06). There were at least two attempts by Pace to contact the flight through Atlanta Radio (RX 13). Piercy's memorandum does not show whether a SELCAL signal was sent on the first attempt, but specifically states SELCAL was used on the later attempt (RX 13). The Atlanta Radio record of the first attempt, similarly, does not make any reference to a SELCAL signal, in contrast to the record of the second attempt which explicitly notes a "VC/SLCL" communication (RX 13 pp. 2-3; Tr. 662, 1013-14).

97. Pace Flight 111 had not yet received a SELCAL signal when Clark left the cockpit for a few minutes to use the lavatory and get some coffee (Tr. 338-40, 404, 1145, 1155-56; CX 44; RX 17). When he returned, the SELCAL chime was activated (Tr. 122, 383, 404; RX 17). He turned up the volume on the Comm Two radio and was told to contact Atlanta ATC on a particular frequency (Tr. 122-23, 383; CX 43). When Pace 111 contacted Atlanta ATC, there was no indication of panic or concern, and normal communications resumed (Tr. 124, 383). The rest of the flight was normal, as Clark had made a standard takeoff, maintained course and altitude, and landed safely (Tr. 381, 396, 727). By the time communications were re-established with Pace 111, the flight had left the airspace of the Atlanta Center and had entered the airspace of the Jacksonville ATC Center (RX 22; Collins Dep. 49).

98. Not including earlier ATC efforts, about 26 minutes elapsed during the attempts by (ARINC and) Pace to contact the flight (Tr. 351, 403, 406-07, 987-88; RX 13). ARINC attempts would not have resulted in contact because Pace flights did not use ARINC's services in the continental United States (CX 32; Tr. 115-17, 660-61).

99. Pace company policies include an Incident Procedures Manual which specifies a clear process of protocol in notifying management of an incident (Tr. 896). After Pace 111 had been out of radio contact for about 15 minutes, Mark Spence, Manager of System Operations Control, alerted Pace management personnel, per the required procedure (including Director of Safety Cobert) (Tr. 890, 896-99, 977; RX 13). Upon being alerted of the Pace 111 NORDO incident, Cobert testified that:

Once I had a handle on the situation as to what was occurring, and what the aircraft was doing, knowing the [Department of Homeland Security] procedures that were going to shortly be implemented outside of the FAA, I went and advised the president of the company that we had a situation that was fairly serious and in all likelihood, if we couldn't make contact with the aircraft, it was going to be met and diverted [by F-16 fighter jets] (Tr. 979; see also, Tr. 1061).

100. Mr. Spence, Pace Flight Follower, had delegated authority within Pace to declare a dispatcher emergency (Tr. 892-93, 1016-17). He notified Cobert that he intended to declare an emergency if contact was not made before Pace 111 entered the Jacksonville ATC center airspace (Tr. 899). Spence was in the process of declaring a dispatcher emergency when contact was re-established with Pace 111 (Tr. 899-900, 981; RX 13).

101. Both Tracy Collins and Harlan Cobert testified that there were classified procedures in effect post-9/11 that addressed the situation where communication is lost with an aircraft (RX 22; Collins Dep. 13, 65). At the time communication was re-established, the scrambling of F-16 fighter jets to intercept Pace 111 in response to Pace's declaration of a dispatch emergency was only moments away (RX 14). Clark acknowledges that there have been changes in airport and aircraft security procedures since 9/11 (Tr. 306).

102. Clark testified that a failure to communicate with ATC for 35 minutes would be an out of the ordinary event (Tr. 352). Clark testified that the captain is the person who is ultimately held responsible for what occurs on an aircraft (Tr. 256). The regulatory standard that the Captain is the responsible party on the aircraft for all problems is reinforced by the testimony of Capt. Holt (Tr. 412), Capt. Jordan (Tr. 461), Capt. Turner (Tr. 872), Capt. Shue (Tr. 933), Director of Safety Cobert (Tr. 956), Pace President Richardson (Tr. 1067), and Clark's expert witness Edward Malone (Tr. 698).

103. Mr. Spence testified that it is not unusual for a missed handoff to result in lost communications for a brief period of time (Tr. 893-94, 898-99). In his 27 years as a dispatcher and flight follower, Pace 111 was the only aircraft which was NORDO for this length of time (Tr. 891, 893). Spence testified that what made the flight so unusual,

... was the length of time that the aircraft was not in contact with air traffic control and the ability of

Pace not to be able to contact the aircraft also. And let me clarify that. It is not unusual from time to time for aircraft to have no contact when you cross a center boundary. But certainly an entire center boundary [is] unprecedented in my career.

(Tr. 893).

104. ATC personnel did not declare an emergency regarding the Pace 111 NORDO event (Tr. 542; CX 37). The loss of communication was not cited by ATC as a pilot deviation, and the Pace 111 NORDO event was not treated as a recorded incident by Atlanta ATC (Tr. 530-32, 543, 662; CX 37, 38, 41).

Capt. Clark's Termination

105. When Pace Flight 111 landed in Sanford, Florida, Clark was instructed to contact Pace (Tr. 124-25; CX 36). His call was directed to Spence and Cobert (*Id.*). Spence told Clark he had to submit to an escorted drug test (Tr. 125-26; CX 36). In light of stated requirements that he be escorted and that he could not fly until the results were in, Clark questioned whether his drug test was random (Tr. 125-26; CX 36). Cobert stated that the test was not random, but was directly related to the events on Pace 111 (*Id.*). Clark submitted to the drug test as ordered (Tr. 128, 995-96). The results were negative (*Id.*)

106. Clark made several attempts to contact the pilots in his chain of command to discuss the events of Pace 111, namely Chief Pilot Turner, Director of Operations Shue, and Senior Director of Operations Phil Beason (Tr. 129-30, 143). Despite leaving messages on office, home, and cell phones, Clark was unable to reach any of them (Tr. 129-30, 143). At one point, Capt. Shue answered his phone and brought in Capt. Beason, who said the matter would not be discussed until Capt. Turner returned from a trip (*Id.*). Clark testified that he was otherwise unsuccessful in discussing the matter with Pace managers in his chain of command (Tr. 143).

107. Clark contacted ATC personnel at both the Atlanta and Indianapolis centers, who stated there was no pilot deviation, no safety concern, and no record or report of the Pace 111 incident (CX 37-39; Tr. 130-32, 136, 532-35).

108. As President and CEO at Pace, Richardson did not get involved in the day-to-day events of the airline (Tr. 1061). Richardson would only get involved if there was a highly unusual and very serious situation (Tr. 1061).

109. Mr. Cobert, Pace's Director of Safety and the airline's liaison to the Department of Homeland Security, was selected by Pace President Richardson to conduct an investigation relating to Pace 111, contrary to the normal practice that such investigations are handled by the employee's direct supervisors (Tr. 1064-65).

110. Cobert testified that as liaison with the Department of Homeland Security, he has been given classified security procedures that he is unable to divulge even to the President of Pace (Tr. 958). Cobert noted that the Pace 111 NORDO event was particularly alarming to him because the 9/11 hijackings started with a loss of radio contact with the planes, and all of the hijacked flights stayed on their designated flight paths until the last few minutes of their flights (Tr. 958).

111. Mr. Cobert prepared memoranda based on interviews he conducted with Clark, Capt. Watkins, Capt. Holt, and ATC personnel (RX 14, 16, 17, 24).

112. In Cobert's June 21, 2002, interview with Clark, Spence asked Clark about the NORDO event to which Clark replied that he did not really understand what Spence was talking about, that they (Pace 111) had not been out of contact for more than a few minutes (RX 24). Clark then responded that he had not been on the flight deck during part of the lost contact and blamed Atlanta ATC center for using an incorrect call sign for radio calls (*Id.*). Cobert found that "Clark was not fully forthcoming in the details concerning either the ATC-NORDO event and his problems with [First Officer] Watkins. Furthermore, that Captain Clark, through his statements was attempting to place the responsibility for all situations that occurred this date onto other persons." (*Id.*).

113. Cobert testified that he "was willing to talk to [Clark] at any time at any length" regarding Pace 111 (Tr. 994). At Cobert's request, Clark sent him a report describing the SELCAL on Pace Flight 111 and the substance of his initial conversation with Ms. Collins at the Atlanta ATC center (CX 43; Tr. 142).

114. Capt. Watkins told Cobert that Clark arrived at Pace 111 agitated and attempted to use the PA system (RX 16). When he realized the PA was inoperative, Clark criticized Watkins for not telling him before he tried to use it (*Id.*). Clark then briefed the lead flight attendant on the communication procedures he intended to use, stating that they were the book procedures (*Id.*). The procedures discussed were different than the other captains that had flown with this crew (*Id.*). Clark

advised her that, "I'm the Captain of this flight" and to "speak when spoken to" (*Id.*). By mutual agreement, they decided not to fly together (*Id.*). Cobert felt that, "[First Officer] Watkins clearly detailed the events to the best of her knowledge and withheld no pertinent information. Furthermore, that [First Officer] Watkins did not create nor cause the events of 21 June 2002." (*Id.*).

115. Capt. Holt told Cobert that he was handling the radios on Pace Flight 111, that the SELCAL signal was received when Clark returned from a visit to the lavatory, and that Holt had not thought anything was out of sorts at the time (CX 44; RX 17; Tr. 384, 1026-29). Holt told Cobert that during the flight Clark elaborated extensively on his displeasure with Watkins and that Clark's discussion of Watkins began after the climb out and continued until Clark left the cockpit to use the restroom (Tr. 1067; RX 17). Holt confirmed that Pace 111 was not monitoring the number 2 communications radio which was still set to CVG (Cincinnati airport) operations, and that Holt was still listening to the Indianapolis ATC center on Comm One and had not noticed that anything was out of sorts on radio communication (RX 17). Cobert felt that Holt was open and honest in his communications of the events of June 21, 2002 (RX 17).

116. Capt. Holt believed at the time that Pace 111 was only out of contact with air traffic control for 10-15 minutes (Tr. 406). Holt testified that if a pilot is out of contact for over 10 minutes with air traffic control in Atlanta, he should contact ATC himself (Tr. 408).

117. Atlanta ATC personnel did not express any safety concern over Pace 111, but did express a security concern to Cobert (Tr. 1018). In his memorandum, Cobert stated that controllers at the Atlanta ATC center "were in contact with NORAD concerning the aircraft" and "[i]nterception of the aircraft was being discussed and had the aircraft not made contact or deviated from its flight plan, the aircraft would have been intercepted" (RX 14).

118. When he completed his investigation, Cobert reported to Chief Pilot Turner and Director of Operations Shue (Tr. 871, 882, 931, 1002, 1032). Turner testified that he spoke with Clark regarding the Pace 111 circumstances a day or two after the flight (Tr. 876-77).

119. Clark felt that Capt. Shue had a history of hostility towards him (Tr. 59-63, 100-01, 1136-39). Capt. Holt testified that Shue at one time called Clark a "pain in the ass" (Tr. 380), and Capt. Jordan testified that Shue once said that

he was going to get rid of Clark and referred to the refueling incident as the reason (Tr. 450). Capt. Shue denied that allegation (Tr. 927). Shue allegedly taunted Clark about the FAA hotline complaint alleging falsification of training records by teasing Clark that Clark might alert the FAA if they took a break (Tr. 100-01). Capt. Shue likewise denied this allegation. (Tr. 930). Shue allegedly told Mr. Wood that he took exception to pilots writing up problems in logbooks (Tr. 558-59). Capt. Shue denied that allegation (Tr. 928).

120. Clark felt that Chief Pilot Turner, similarly, had a history of hostility towards him and had also expressed his intent to get rid of him (Tr. 62-63, 82). Capt. Jordan testified that Turner had expressed one time before May 2001 (when Clark was still Manager of Flight Standards) a desire to "get rid of [Clark] as soon as I can" (Tr. 427-28). Turner testified that he has never had a grudge against Clark (Tr. 874). Captain Turner was described as "disdainful" towards standard operating procedures by Ron Adams, a former Pace pilot (Tr. 1103). Clark alleges that Capt Turner conceded that Clark was disliked because of his insistence on following standard operating procedures (Tr. 885). Turner testified that "[y]ou've got to have good standard operating procedures but ... it's the way [Clark] goes about presenting them to people. People resent it." (Tr. 885).

121. Shue, Turner, and Cobert met with Pace President Richardson (Tr. 883, 932, 1002-03, 1032, 1065). Cobert reported on his investigation (Tr. 1002, 1049-50, 1064, 1065). Clark was not present at the meeting, no one spoke on his behalf, and none of the memoranda he had written were provided to Richardson (Tr. 1049-50, 1077, 1080).

122. The discussion at the meeting related solely to the events of June 21, 2002, and did not reference the sexual harassment dispute or the misfueling error, of which Mr. Richardson was unaware at the time (Tr. 1004, 1049, 1069-70, 1080).

123. Capt. Turner believed that the exchange between Clark and Watkins created a bad tone for Pace 111, which, in turn, resulted in no one paying attention to the details of flying the aircraft on the leg from Cincinnati to Sanford, Florida (Tr. 871). Turner believed the NORDO flight was a very severe incident in a very busy air traffic corridor (Tr. 874). Turner recommended that Clark be terminated because he was the captain of Pace 111 (Tr. 872).

124. Capt. Shue believed that the environment in the cockpit on Pace 111 was not conducive to safety (Tr. 932). According to Shue, something happened in the cockpit to cause the crew not to function as a normal crew and, for this reason, the airplane flew hundreds of miles without radio contact (Tr. 933). Clark was the pilot in command and the person with the responsibility for the safety of the flight (Tr. 934).

125. Capt. Shue and Capt. Turner both recommended that Clark be terminated, and Cobert agreed with that recommendation (Tr. 871-74, 883, 932, 1002-05). Based on the information presented by Cobert and after considering the recommendations of Shue and Turner, Mr. Richardson directed that Clark be terminated (Tr. 1005, 1065, 1070, 1076-79). Richardson based that decision solely on the NORDO incident with Pace 111 (Tr. 1067-1071). The decision to terminate Clark was made by Richardson alone (Tr. 1002, 1065).

126. Richardson testified that he terminated Clark because Clark was the pilot in command of the aircraft when the NORDO incident occurred (Tr. 1067). Richardson testified that he felt the NORDO incident was a serious breach of safety and security and that he would have terminated any pilot who acted in this manner (Tr. 1067-1068). Richardson noted that Clark didn't think he was out of radio contact for a very long period, and the fact that he was NORDO for almost 35 minutes, flew through the entire Atlanta Air Traffic Control Center without contact, and wasn't even aware of his NORDO situation, confirmed in Richardson's mind that Clark was not focused on flying Pace 111 as he should have been (Tr. 1067). If Clark lost control onboard Pace 111, then such an incident could happen again, which Richardson felt was an unacceptable safety and security risk to the airline (Tr. 1069).

127. On June 26, 2002, Capt. Turner reached Clark by telephone and informed him that he was being terminated (Tr. 144). When asked the reason for his termination, Turner referred to the loss of ATC communications on Pace 111 (*Id.*). On the same date, Capt. Turner signed a letter to Clark referencing their telephone conversation and terminating his employment (CX 45; RX 18). The only reason stated in the letter for the termination was that Clark was pilot-in-command of a flight that was out of radio contact with ATC for 35 minutes (*Id.*).

128. Pace's policies called for progressive discipline with penalties of increasing severity, starting with an oral reprimand, then a written reprimand, then probation or suspension, and finally termination (CX 42B at § 7.2; Tr. 138-

39). Pace's written employment policy states: "Before being subjected to any discipline, an employee will be given an opportunity to relate his/her version of the incident or problem and provide an explanation or justification." (CX 42B at § 7.2; Tr. 141). The manual also states that "Employees who commit ... serious safety violations will be suspended at the time of the incident, pending a management investigation and review of the matter... Employees who are found guilty of the charges will be discharged without delay." (*Id.*). Pace's employment policies identify specific categories of misconduct that could lead to immediate termination (CX 42A at 17-18, 42B at § 7.2). Included in those immediate termination categories is "extreme misconduct or serious safety violations" (Tr. 137-41, 183-87).

129. Prior to termination, Clark was not orally reprimanded, did not receive a written reprimand, was not placed on probation, was not required to engage in retraining, or disciplined in any manner (Tr. 145-46).

130. Neither Capt. Watkins nor Capt. Holt were terminated by Pace in connection with Pace 111 (Tr. 149, 383-85, 803-04). Neither of those pilots was required to submit to a drug test (*Id.*). Both pilots, who were first officers at the time, have since been promoted to captain at Pace (Tr. 149, 383-85, 803-04).

Capt. Clark's Efforts to Secure Unemployment Compensation and Substitute Employment

131. Following his termination, Clark applied for unemployment benefits (Tr. 151). He was advised by the North Carolina Employment Security Commission that Pace contested his application on the grounds that he was terminated for cause, specifically for failure to follow procedures and ignoring attempts at radio contact for 35 minutes (Tr. 151-52; CX 47).

132. Capt. Holt sent a handwritten letter to the North Carolina Employment Security Commission stating that the accusations were "false" and Clark "did not ignore radio calls for 35 min." (CX 48; Tr. 152-53, 385, 405). Clark's application for unemployment benefits was then granted over Pace's opposition (Tr. 153).

133. Clark testified that he made extensive efforts to secure comparable employment (Tr. 153-54). He allegedly made hundreds of inquiries, and kept a spreadsheet on his computer tracking prospects and applications (*Id.*). Notwithstanding that effort, he only secured part-time work for a short period of

time that did not carry any insurance or retirement benefits (*Id.*).

134. Pace terminated Clark on June 26, 2002, less than one year before he would have reached the FAA mandatory retirement age of 60 in May 2003 (Tr. 154, 354).

135. While he can no longer be a line pilot due to FAA age restrictions, Clark remains capable of serving in his former management position (Tr. 39, 155-56, 354-55, 471, 846-47, 867, 875-76). He is also capable of conducting training past age 60 (Tr. 156, 480). Hopkins testified that in his experience, only one line pilot had ever been retained by Pace after the mandatory age 60 retirement (Tr. 846).

136. Clark did not file a breach of contract suit against Pace for failing to live up to the terms of its alleged oral agreement with Clark (Tr. 296). Clark did not address any memorandum to Pace stating that they were not honoring the alleged employment contract with Clark (Tr. 297). Clark did not file a wage and hour suit, nor a report with the Department of Labor regarding payroll shortages (Tr. 298).

Discussion

AIR 21 prohibits employers from discriminating against employees who:

- (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety ... or any other law of the United States;
- (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety ... or any other law of the United States;
- (3) testified or is about to testify in such a proceeding; or

- (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a) (2002); See also, 29 C.F.R. § 1979.102(b) (2002).

Burden of Proof

The burdens of proof in an AIR 21 case are set out in 49 U.S.C. § 42121(b) (2) (B):

- (i) The Secretary of Labor shall dismiss a complaint ... and shall not conduct an investigation otherwise required ... unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action.
- (ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.
- (iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
- (iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

49 U.S.C. § 42121(b) (2) (B) (2002).

The burden of proof standard in the whistleblower protection provisions of AIR 21 is the same as that of the Energy Reorganization Act ("ERA"). The ERA burden of proof standard was amended in 1992 and it is that standard that

appears in AIR 21. The two leading cases applying the post-1992 ERA amendments are *Trimmer v. U.S. Department of Labor*, 174 F.3d 1098 (10th Cir. 1999), and *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568 (11th Cir. 1997). *Trimmer* and *Stone & Webster* interpret and apply the burdens of proof in the same fashion. The proof burdens as stated in *Trimmer* are as follows:

The Energy Reorganization Act of 1974 (ERA) prohibits any employer from discharging or otherwise discriminating against any employee "with respect to his compensation, terms, conditions, or privileges of employment" because the employee engaged in protected whistleblowing activity. 42 U.S.C. § 5851(a). In 1992 Congress amended § 5851 of the ERA to include a burden-shifting framework distinct from the Title VII employment-discrimination burden-shifting framework first established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-05, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). See Energy Policy Act of 1992, Pub.L. No. 102-486, § 2902(d), 106 Stat. 2776, 3123-24 (amending 42 U.S.C. § 5851(b)). Although Congress desired to make it easier for whistleblowers to prevail in their discrimination suits, it was also concerned with stemming frivolous complaints. Consequently, § 5851 contains a gatekeeping function, which provides that the Secretary cannot investigate a complaint unless the complainant has established a *prima facie* case that his protected behavior was a contributing factor in the unfavorable personnel action alleged in the complaint. See § 5851(b)(3)(A). Even if the employee has established a *prima facie* case, the Secretary cannot investigate the complaint if the employer can prove by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. See § 5851(b)(3)(B). Thus, only if the employee establishes a *prima facie* case and the employer fails to disprove the allegation of discrimination by clear and convincing evidence may the Secretary even investigate the complaint.

If, as here, the case proceeds to a hearing before the Secretary, the complainant must prove the same elements as in the *prima facie* case, but this time must prove by a preponderance of the evidence that he engaged in protected activity which was a contributing factor in an unfavorable personnel decision. See § 5851(b)(3)(C); see also, *Dysert v. Secretary of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997).... Only if the complainant meets his burden does the burden then

shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior. See § 5851(b)(3)(D).

Trimmer, 174 F.3d at 1101-02.

The Administrative Review Board ("ARB") has also addressed the burdens of proof in ERA cases. See, e.g., *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31 (ARB Sept. 30, 2003). The ARB's holding in *Kester* remains consistent with the framework articulated in *Trimmer* and *Stone & Webster*. The ARB held that a complainant must demonstrate by a preponderance of the evidence that he or she engaged in a protected activity, that the employer was aware of the protected activity, that the complainant was subject to an adverse employment action, and that complainant's protected activity was a contributing factor in the adverse employment action. *Id.* If the complainant meets this burden, then the employer must demonstrate by clear and convincing evidence that it would have taken the same personnel action in the absence of the protected activity. *Id.*

Under the evidentiary framework prescribed in 49 U.S.C. § 42121(b)(2)(B), as interpreted by *Trimmer*, *Stone & Webster*, and *Kester*, the complainant has the initial burden of proving by a preponderance of the evidence that: (1) he engaged in protected conduct; (2) the respondent was aware of that conduct; (3) the complainant suffered an adverse employment action; and, (4) that his protected activity was a contributing factor in the unfavorable personnel decision. Forty-nine U.S.C. § 42121(b)(2)(B) (2002); *Trimmer*, 174 F.3d at 1101-02; *Stone & Webster*, 115 F.3d at 1572; *Kester*, 2000-ERA-31 at 3. If the complainant carries his burden by a preponderance of the evidence, then the respondent can avoid liability if it can prove by clear and convincing evidence that it would have taken the same adverse employment action in the absence of the complainant's protected activity. Forty-nine U.S.C. § 42121(b)(2)(B) (2002).

Protected Activity Defined

The employee protection provisions of AIR 21 are set forth at 49 U.S.C. § 42121. Subsection (a) prohibits discrimination against employees of air carriers or contractors or subcontractors of air carriers who provide information to the employer or the Federal Government relating to a violation of laws pertaining to air carrier safety. Forty-nine U.S.C. § 42121(a) (2002).

Case law and secretarial decisions regarding similar whistleblowing statutes provide insight into what constitutes protected activity. The Secretary has held consistently that internal complaints are protected activity under the whistleblower provisions of the environmental statutes. See, e.g., *Bassett v. Niagara Mohawk Power Corp.*, 1985-ERA-34 (Sec'y Sept. 28, 1993); *Helmstetter v. Pacific Gas & Electric Co.*, 1991-TSC-1 (Sec'y Jan. 13, 1993); *Williams v. TIW Fabrication & Machining, Inc.*, 1988-SWD-3 (Sec'y June 24, 1992). Although the employee's allegation need not be ultimately substantiated, the employee must have a reasonable belief that his or her safety complaint is valid. *Minard v. Nerco Delamar Co.*, 1992-SWD-1 (Sec'y Jan. 25, 1995), slip op. at 8; *Kesterson v. Y-12 Nuclear Weapons Plant*, 1995-CAA-12 (ARB Apr. 8, 1997); *Nathaniel v. Westinghouse Hanford Co.*, 1991-SWD-2 (Sec'y Feb. 1, 1995), slip op. at 8-9. As the belief must be reasonable, the standard is objective rather than subjective. *Lawson v. United Airlines, Inc.*, 2002-AIR-6, slip op. at 26 (ALJ Dec. 20, 2002).

To be covered as protected activity, however, an employee's acts must implicate safety definitively and specifically. *American Nuclear Resources v. Department of Labor*, 134 F.3d 1292 (6th Cir. 1998). General inquiries regarding safety do not constitute protected activity. *Bechtel Construc. Co. v. Secretary of Labor*, 50 F.3d 926, 931 (11th Cir. 1995). Moreover, an employer may terminate an employee who behaves inappropriately, even if that behavior relates to a legitimate safety concern. *Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986).

"The [Act] does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *American Nuclear Resources, Inc.*, 134 F.3d at 1295 (citing *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1574 (11th Cir. 1997)). "Whistleblowing must still occur through prescribed channels." *Stone & Webster Eng'g Corp.*, 115 F.3d at 1574.

As an example, in *Bechtel*, a carpenter disagreed with his foreman about safety procedures for protecting radioactive tools. *Bechtel*, 50 F.3d at 931. The Court protected the carpenter's acts because he raised particular, repeated concerns with a supervisor that correct safety procedures were not being observed, which were "tantamount to a complaint." *Id.*

Likewise, in *Pogue v. United States Dep't of Labor*, 940 F.2d 1287 (9th Cir. 1991), an employee filed seven internal safety complaints with his employer. The Court held that even

though the employee was often disrespectful, the complaints were protected activity under the Act.

By contrast, in *Stone*, the employee held a weekly meeting at which he discussed fire safety with his fellow ironworkers. *Stone & Webster Eng'g Corp.*, 115 F.3d at 1574. The Court held that the weekly general safety meeting with coworkers alone did not constitute protected activity.⁹ *Id.*

In *American Nuclear Resources, Inc.*, the employee complained about an isolated incident where radiation protection employees at the nuclear power plant where he was working didn't know "what they were doing," resulting in the employee being contaminated with radiation. *American Nuclear Resources, Inc.*, 134 F.3d at 1294. The Court did not consider the employee's vague allegations to be protected activity. *Id.* at 1296. The Court held that the employee:

... never alleged that [the employer] was violating nuclear laws or regulations. He never alleged that [the employer] was ignoring safety procedures or assuming unacceptable risks. ... [The employee's] conduct never led anyone to change, probe or even question [the employer's] safety procedures.

Id. at 1296.

CONCLUSIONS OF LAW

Complainant contends that he engaged in the following protected activities:

1. Inoperative PA System on board Pace Flight 111.

Clark argues that his written reports to Chief Pilot Turner and Director of Safety Cobert regarding the inoperative PA system on Pace 111 involved a "safety issue." (Comp. Br. 47). Clark argues that an inoperative PA is a safety concern because the pilots must be able to communicate with the flight attendants and passengers (*Id.*; FoF ¶ 74). FAA regulations deal with this type of malfunction. See, e.g., 14 C.F.R. § 121.628(a)(5) (prohibiting takeoff of airplane with inoperative equipment unless all conditions and limitations set

⁹ The *Stone* Court ultimately found that the meetings were part of a pattern of protected activity because the "meeting ... was included in a series of communications to employer representatives ... [that] were, under the circumstances, mutually reinforcing." *Stone & Webster Eng'g Corp.*, 115 F.3d at 1575.

forth in the Minimum Equipment List have been satisfied); 14 C.F.R. § 121.135(b)(5) (the required manual must include flight procedures relating to inoperative equipment).

The PA system is a deferrable repair, and the problem with the PA system was properly noted in the aircraft log book (FoF ¶ 74; CX 31). In the case of an inoperative PA system, the mandatory procedure requires the Captain to establish an alternative communication procedure (FoF ¶ 74). Although Clark experienced difficulty in establishing this alternative communication procedure (FoF ¶ 75), he was ultimately successful, and the flight took off as scheduled.

Clark has not argued that the inoperative PA system was in violation of any FAA order, standard, or regulation. See 49 U.S.C. § 42121(a) (2002). Clark's report acknowledges that the PA system was promptly noted in the log book and properly deferred (FoF ¶ 73; CX 31). Clark does not argue that Pace ignored safety procedures or assumed unacceptable risks in regards to its handling of the PA malfunction. *American Nuclear Resources, Inc., supra*. Although Clark reports the inoperative PA as a "safety issue" (see CX 30, 31), his reports focus primarily on his interaction with First Officer Watkins and not on the PA system itself.

Like the employee in *American Nuclear Resources, Inc.*, Clark's reporting of the inoperative PA is an isolated incident, which was timely noted in the aircraft's log, was properly deferred, and which did not lead anyone to suggest that Pace was assuming unacceptable risks or to question Pace's safety procedures relating to this malfunction. The reporting of the inoperative PA system, on its own, does not rise to the level of protected activity.

2. The Change of First Officers on Pace Flight 111.

On June 21, 2002, Clark submitted separate reports to Chief Pilot Turner and Director of Safety Cobert explaining his decision to switch first officers on Pace 111 (CX 30, 31). In both reports, he identified the problem as a "safety issue" (CX 30, 31).

The first officer originally assigned to Pace 111 was Capt. Watkins (FoF ¶ 69). Clark had flown with Capt. Watkins as his first officer on one earlier occasion, and Clark felt that there were incidents from that previous flight that prompted him to have safety concerns about Capt. Watkins' abilities (*Id.*; CX 31).

As part of Pace 111 pre-flight preparations, Clark attempted to make a PA announcement to the passengers, but when he picked up a microphone Capt. Watkins told him the microphone did not work (FoF ¶ 70; CX 30, 31; RX 16). Clark believed Capt. Watkins withheld safety information in order to get the airplane moving by encouraging him to accept the airplane as having no problems (FoF ¶ 70).

Clark summoned the lead flight attendant, Ms. Lynn, to the cockpit to brief her and Watkins on the required alternative communication procedure (FoF ¶ 74; CX 30, 31; RX 16). Watkins interrupted Clark twice during his proposal and tried to describe the alternative communication procedures used by previous captains and crews who had flown with the inoperative PA (*Id.*). Clark responded to Watkins' interruptions by authoritatively stating to Watkins that she would speak only when spoken to, and Clark then took Ms. Lynn out onto the jet bridge to complete the briefing (FoF ¶ 74).

In response to the pre-flight events between Clark and Watkins, Clark contacted Pace crew scheduling and arranged to switch first officers with the flight he was originally assigned to fly (FoF ¶ 75; CX 30, 31). He spoke with Watkins, and they made plans to discuss the matter further in Sanford (*Id.*). Capt. Holt then came over from the other aircraft to become the first officer on Pace 111 (*Id.*).

Clark argues that Watkins' interference with his attempt to establish the required alternative communications procedure constituted a violation of his authority as the pilot in command and, therefore, created a safety concern (Comp. Br. 48). Several FAA regulations define the authority of the pilot in command. See, e.g., 14 C.F.R. § 91.3(a) (pilot in command is "final authority" on operation of the aircraft); § 121.537(d) (pilot in command has "full control and authority" over operation of the aircraft and other crew members); § 121.538(e) (authority extends to preflight planning). Clark argues that Capt. Watkins' conduct infringed on his authority as pilot in command, that such conduct violated FAA regulations establishing the authority of the pilot in command, and that reporting of that violation to Dave Turner, Chief Pilot (CX 30), and Harlan Cobert, Director of Safety (CX 31), was protected activity within the scope of the Act (Comp. Br. 48-49).

Clark's internal reports to Pace do not specifically mention the regulations cited above, but they do reflect that his incident with Watkins deteriorated into a communications problem which Clark felt disrupted the functioning of the crew,

infringed on his authority as captain of the flight, and delayed the preflight preparations (CX 31).

Clark's reports, however, do not have a sufficient nexus to safety to be protected activity. In Clark's memo to Chief Pilot Turner, he acknowledges a problem in communications with Watkins and then states that:

I resolved the problem by recommending swapping of crewmembers with another aircraft at an adjacent gate. ... Crew scheduling agreed and the swap was made. There was no additional delay from this change.

(CX 30).

Clark, in his memo to Cobert, Director of Safety, gives the story in more detail and again states that he was able to resolve the problem without additional delay to the flight (CX 31).

The PA system malfunction was properly noted and deferred in the aircraft's logbook. There was miscommunication between Watkins and Clark on the status of the aircraft. Had Clark read the logbook before trying the PA system or asking Watkins about the status of the aircraft, the oral exchange regarding the PA system would not have taken place. Clark and Watkins each attached different meanings to Clark's inquiry about the status of the aircraft, and the record is unclear as to whether Clark had sufficient time upon entering the aircraft to review the logbook or whether he should have reviewed the logbook to see the malfunctioning PA system notation before attempting to use the system or before asking Watkins about the aircraft. This was miscommunication between individuals that could have been quickly resolved in many ways, including a review of the logbook or a quick apology and/or explanation by either officer. Instead, for whatever reason, it degenerated into a personality conflict. While Clark may have been able to avoid the communication problems with Watkins through better communication skills and through a less overbearing and more receptive tone, the ultimate decision on the alternative communication methods to be used on Pace 111 was his alone to make as captain of the flight. When Clark felt that the communications problem with Watkins became a concern, he acted within his authority as captain, arranged the swap of first officers, and the aircraft took off without further delay and with the "safety issue" resolved.

In Complainant's Exhibit 31, Clark offers "background" information regarding his previous flight with Watkins. He

fails to mention the date of this flight, does not suggest that Watkins be retrained or disciplined for her alleged behavior on the flight, and does not suggest that Pace was violating FAA regulations or orders. The "background" offered focused on disagreements over procedures, complaints, and uncooperative behavior exhibited by Watkins, and was included to show that Watkins was hard to get along with and was prone to "emotional argument[s]."

Like the employee in *American Nuclear Resources, Inc.*, Clark does not allege that Pace was violating FAA regulations or that Pace was ignoring safety procedures or assuming unacceptable risks. 134 F.3d at 1296; 49 U.S.C. § 42121(a)(1) (2002). Both memorandums reflect a communications problem that had the potential to become a safety concern which was resolved by the captain before take-off.

"The [Act] does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *American Nuclear Resources, Inc.*, 134 F.3d at 1295. The June 2002, reports at CX 30 and CX 31 are not protected activity as defined by the Act.

3. Write-ups of Equipment Failures and Malfunctions.

As a pilot for Pace, Clark encountered a normal variety of equipment failures and malfunctions, and pursuant to the regulations, he recorded problems in the plane's logbook (FoF ¶ 49). See also, 14 C.F.R. § 121.563 ("[t]he pilot in command shall ensure that all mechanical irregularities occurring during flight time are entered in the maintenance log of the airplane at the end of that flight time."). Clark argues that when he reported his maintenance concerns to the FAA (FoF ¶ 54), he was engaged in protected activity (Comp. Br. 49).

Clark's FAA report on equipment maintenance issues implicates safety definitively and specifically. *American Nuclear Resources, Inc.* Although Pace offered statements from Mr. Wood explaining attempts made by Pace to correct the problems, the record shows that some of the equipment problems were recurring in nature, despite Pace's efforts to correct the problems (FoF ¶ 51). Clark had a reasonable belief that ongoing, repetitive equipment failures were a valid safety complaint, and after repetitive log entries detailing the equipment problems without resolution, Clark notified the FAA of his concerns (FoF ¶ 54). The October 2001 FAA hotline complaint is protected activity.

Clark also argues that he continued regular logbook notations through the time he was terminated, and that by reporting safety problems to the personnel responsible for correcting them, Clark engaged in protected activity (Comp. Br. 50). The logging of equipment malfunctions in the logbook is required by the FAA (FoF ¶ 49). Logbook write-ups alone, however, are not enough to be considered protected activity.

It is not the existence of the pre-flight [mechanical] discrepancy which constitutes a violation, and a crew member's notation in a maintenance log is not a proceeding. Yet, an attempt to retaliate for, interfere with, or improperly influence the performance of a duty required by the FAR may trigger the protections of AIR 21. Consequently, if an airline seeks retribution against an aircrew member for performing required safety-related missions or if it engages in harassment, intimidation, or coercion in an attempt to interfere with an aircrew member's duty in the future, honestly and objectively, to carry out pre-flight inspection and reporting obligations, the airline's action may implicate the broad, remedial protections afforded by AIR 21.

Szpykra v. American Eagle Airlines, Inc., 2002-AIR-9, 5-6 (ALJ July 8, 2002).

Clark testified that he felt belittled and ostracized for making log entries but did not present evidence that Pace management was responsible for those feelings (FoF ¶ 53). Clark testified that he felt strong pressure not to record equipment problems, as Pace was a small airline with a limited supply of parts and trained mechanics, but again Clark presented no evidence that Pace management was applying the alleged pressure felt (*Id.*). In short, Clark presented no evidence that Pace management harassed, intimidated, or coerced him to not make the FAA required logbook entries. *Szpykra*, 2002-AIR-9 at 5-6.

Clark cannot rely on his diligence in reporting equipment problems or on the disparaging remarks made by repair personnel. In *Lockert*, the complainant, a quality control inspector, argued that he was fired for doing his job too conscientiously. *Lockert v. United States Dep't. of Labor*, 867 F.2d 513, 514 (9th Cir. 1989). During his employment, he had reported to his employer a large number of discrepancies between the applicable safety standards and actual conditions. *Id.* at 515. Witnesses testified that several employees made disparaging remarks about the complainant's safety-related activities and complaints. *Id.* at 516. In affirming the Administrative Law Judge's dismissal

of the complaint, the Court noted, in part, that the complainant failed to submit any evidence establishing that he had made an unusually large or unusually serious number of safety complaints in relation to other inspectors and that only one of the many employees making disparaging comments was involved in the decision to terminate the complainant. *Id.* at 516, 519.

While Clark argued that he was a stickler for making the required log entries, he presented no evidence that he made an unusually large number of logbook entries or that his notations were of a more serious nature than other pilots. Clark testified that maintenance personnel, at times, would refer to his write-ups as "Mike Clark problems" (FoF ¶ 53). Those disparaging comments regarding logbook entries, however, were made by maintenance personnel and not by Pace managers in control of employment decisions regarding Clark. Further, Mr. Wood, Pace's Manager of Avionics, testified that the maintenance workers' reference to a "Mike Clark problem" represented frustration by the maintenance crew that they had experienced difficulty in finding a solution to an ongoing problem on an aircraft with recurring logbook entries by Clark, and not to frustration towards Clark himself (FoF ¶ 53).

Clark's logbook entries are not, by themselves, protected activity, *Szpyrka*, and Clark has failed to establish that Pace management used harassment, intimidation, or coercion in an attempt to interfere with his FAA reporting duties. *Szpyrka*, *supra*. Clark's logbook entries are not protected activity under the Act.

4. The February 2002 Duty Time Violation

In February 2002 Clark and Capt. Holt were the pilots on a Pace flight which was delayed due to a security threat in Mexico (FoF ¶ 62). The delay put both pilots in a situation where they could not complete the remaining leg of the flight without exceeding the 16-hour workday maximum imposed by FAA regulation (*Id.*). The pilots contacted Pace raising their concern and were told that the company had a legal interpretation that the trip would be legal because the delay was beyond the company's control (*Id.*).

Clark refused to take the flight until Mr. Zehner faxed to him a handwritten letter stating that the flight was legal based on the legal interpretation and expressly revising a provision in Pace's General Operations Manual that would also have prohibited exceeding the duty time (FoF ¶ 64; CX 26). When Mr. Zehner did so, the pilots agreed to take the flight and in doing so, exceeded the 16-hour duty time limitation (*Id.*).

After the flight, Capt. Clark contacted Chief Pilot Turner and Director of Safety Cobert (FoF ¶ 65). Both Clark and Capt. Holt submitted a NASA report concerning the duty time violation (FoF ¶ 66). NASA reports are used to self-disclose FAA violations while avoiding FAA enforcement of the violation (FoF ¶ 36).

Clark's internal report to Turner and Cobert, and his subsequent NASA report to the FAA (CX 27), were direct reports of information regarding a violation by Pace of an order, regulation, or standard of the FAA related to air safety. 49 U.S.C. § 42121(a)(1) (2002). As such, they are protected activity under the Act.

5. Removal of Emergency Procedure from Aircraft Manuals

FAA regulations require a manual or set of manuals setting forth operating procedures applicable to a given type of aircraft. Clark created a Flight Standards Manual to serve that purpose (FoF ¶ 57); see also, 14 C.F.R. §§ 121.133, 121.141. The manuals are required to be carried on the airplane (See 14 C.F.R. §§ 121.137(b), 121.141(b)), and must include procedures "if any item of equipment required for the particular type of operation becomes inoperative or unserviceable en route." 14 C.F.R. § 121.135(b)(5). Any changes to the manuals require FAA approval. 14 C.F.R. § 121.141.

Clark became aware of an unauthorized deletion from the Flight Standards Manual when a warning light activated during a passenger flight indicating a failure in the cargo fire suppression system (FoF ¶ 60). Clark asked the first officer to consult the procedure in the Quick Reference Handbook, which contains emergency procedures and is derived from a chapter in the Flight Standards Manual (*Id.*). The applicable procedure, however, was missing from the Quick Reference Handbook (*Id.*). Clark then asked the first officer to refer to the Flight Standards Manual, where the emergency procedure should also have been located, but it had been removed from that manual as well (*Id.*). The emergency procedure had been replaced with a note directing the pilots to consult a different manual (*Id.*). Clark reported the problem to Chief Pilot Turner and Director of Safety Cobert (FoF ¶ 61).

Clark's internal report to Pace management of an FAA violation regarding the deletion of the emergency procedure from the Flight Standards Manual falls within the protected activity of the Act. 49 U.S.C. § 42121(a) (2002).

6. Falsification of Records and Pilot Training Deficiencies

Clark had concerns about the training Pace pilots were receiving (FoF ¶ 53). Training requirements are imposed by regulation (See 14 C.F.R. §§ 121.419, 121.424, 121.427(d), 121.433), and training programs are reviewed and approved by the FAA. (See, e.g., 14 C.F.R. § 121.405). Clark felt that training records had been falsified to state that required training functions had been completed when they had not, that proficiency checks that should take hours were completed in 15 or 20 minutes, that recorded simulator time was considerably greater than actual simulator usage, and that specific items required for proficiency tests were ignored (FoF ¶ 53).

Clark placed a call to the FAA hotline in October 2001 regarding his training and maintenance concerns (FoF ¶ 54).¹⁰ While such calls can be made on an anonymous basis, Clark provided his name and telephone number (*Id.*).

Clark provided the Federal Government with information relating to alleged violations of FAA regulations. Clark's October 2001, FAA call regarding alleged training violations was protected activity within the Act. 49 U.S.C. § 42121(a)(1).

7. Violation of Check Airman Requirements

Clark argues that he reported to the Flight Standards Department and Pace management that check airmen at Pace were not fulfilling their duties relating to records of testing and training events (Comp. Br. 52).

Clark wrote two memoranda dated January 4, 2001, to personnel in his department and Pace management concerning deviations from check airmen responsibilities and emphasizing the importance of accurate and timely reporting of training and testing events (FoF ¶ 18; CX 24, 25). See also, 14 C.F.R. § 121.683(a)(1) (requiring that airline maintain current records of proficiency and training); 14 C.F.R. § 121.441(e) (prohibiting use of a pilot if proficiency test is not satisfactorily completed).

Complainant's Exhibit 24 is a January 4, 2001, memorandum issued by Clark to Capt. Dan Carson, Check Airman, regarding

¹⁰ This FAA hotline call is the same call made regarding write ups of equipment failures in No. 3 above. As the single call regarded two distinct topics, each has been analyzed separately for inclusion as protected activity.

timeliness of reports and completion standards. Clark expressed appreciation for help given by Carson and repeated company policies regarding testing. He listed the places in Pace manuals and other documents where these guidelines are maintained and told Carson that anyone who is unable or unwilling to follow the standards cannot expect to continue as a check airman.

As stated above, "[t]he [Act] does not protect every incidental inquiry or superficial suggestion that somehow, in some way, may possibly implicate a safety concern." *American Nuclear Resources, Inc.*, 134 F.3d at 1295. The Complainant's memorandum laying out policies and procedures in four separate points does not allege violation of any order, standard, or regulation of the FAA. 49 U.S.C. § 42121(a) (CX 24). There is no indication in the memorandum that it was forwarded to Pace Management or the Federal Government (*Id.*). As such, while timeliness and completion of check airman duties is safety related, this memorandum does not rise to the level of protected activity as defined by the Act.

A second memo, also dated January 4, 2001, was issued to all check airmen, with the subject of check airman duties and responsibilities (CX 25). Clark thanked check airmen who assisted in revising company policies, and then issued three "reminders" regarding missing or late reports, incomplete events, and adherence to standards and minimum levels of performance. Clark again listed the company documentation where all of these procedures and standards could be found, and stated that "hopefully this memo will suffice to gain compliance in the few cases where it may need improvement."

This memo hints at a violation of standards by stating that Clark hopes to gain full compliance "in the few cases where it may need improvement," and as a PIDA memorandum, it would have been circulated to Pace management (FoF ¶ 13). By alerting Pace management through a PIDA memorandum of less than full compliance with all FAA required check airmen standards, this memo (CX 25), dated January 4, 2001, represents protected activity as defined by the Act. 49 U.S.C. § 42121(a)(1) (2002).

Clark argues that he engaged in protected activity as a check airman when he discussed a line check that he scheduled for himself to review a pilot in the New York operation (Comp. Br. 52).

When recurring safety concerns at the New York operation persisted after Clark's informal efforts to gain compliance, Director of Operations Zehner requested that Clark put the

problems in writing as a stimulus to corrective action (FoF ¶ 28). On March 6, 2001, Clark sent a letter to Zehner describing in detail noncompliance and safety problems with the New York operation (*Id.*; CX 14). Clark's March 6, 2001, memorandum to Zehner, a Pace manager, detailing FAA noncompliance and safety issues, is protected activity as defined by the Act. 49 U.S.C. § 42121(a)(1) (2002).

In his capacity as manager of check airmen (FoF ¶ 9, 27), Clark received a report about a pilot for the New York operation that gave him serious safety concerns, and Clark scheduled a line check that he, himself, would conduct as check airman (*Id.*). Clark discussed the matter with Hopkins and Zehner, both Pace managers, who determined that a line check was not necessary under the circumstances (*Id.*). Pace instead sent another employee to review the situation and make recommendations (*Id.*). Clark's discussion with Hopkins and Zehner, Pace managers, regarding reported safety violations by the New York pilot represents an internal complaint and is protected activity. 49 U.S.C. § 42121(a)(1) (2002); *Basset, Halmstetter, Williams*, *supra*.

8. Violations of Weight and Balance Procedures.

Airline manuals required by regulation must include "[m]ethods and procedures for maintaining the aircraft weight and center of gravity within approved limits." 14 C.F.R. § 121.135(b)(20). Proper weight and balance procedures are important to safety because accurate calculation of weight distribution within the aircraft directly affects operational control over its flight capabilities (FoF ¶ 13). Proper weight and balance was one of the FAA's major concerns before Clark joined Pace, and Clark encountered repeated failures to follow the approved procedures (*Id.*). In January and February 2001, Clark circulated three memoranda stressing the need to comply with mandatory weight and balance procedures and noting noncompliance (*Id.*; CX 10-12). Those communications were "PIDA" memos, indicating they were sent by e-mail to all management personnel at Pace (FoF ¶ 13).

Clark's PIDA memorandums, which circulated to Pace management, informed both employees and Pace management of violation of mandated FAA standards and regulations. As such, the memoranda (CX 10-12), constitute protected activity under the Act. 49 U.S.C. § 42121(a)(1).

9. Other Flight Standard Violations.

Clark produced a series of reports to Pace management regarding noncompliance of a variety of flight standards (Comp. Br. 53; CX 11, 12, 13, 14). Complainant's Exhibits 11 and 12 were PIDA memos, which were sent to all management personnel at Pace (FoF ¶ 13). Complainant's Exhibits 13 and 14 were sent to Director of Operations Zehner.

Clark's four memos reported violations of several safety regulations including en route flight, navigation, and communication procedures (14 C.F.R. § 121.135(b)(5); CX 11, 14), sterile cockpit requirements for critical phases of flights (§ 121.542; CX 14), requirements that crewmembers remain seated at controls (§ 121.543; CX 11), manipulation of controls by unauthorized individuals (§ 121.545; CX 11, 12), admission to the flight deck (§ 121.547; CX 12), passenger briefings (§§ 121.571, 121.573; CX 14), the closing and locking of the cockpit door (§ 121.587; CX 12, 14), and verification that carry-on baggage is properly stored (§ 121.589; CX 14).

As each of these memos reported violations of FAA standards or regulations and as they were communicated to Pace management, they are protected activity as defined by the Act. 49 U.S.C. § 42121(a)(1) (2002). Pace acknowledges that these four memos represent protected activity (Resp. Br. 19).

10. Deficiencies in Pilot Proficiency.

Federal regulations require pilot training and proficiency testing in order to ensure that acceptable standards of ability are maintained. See, e.g., 14 C.F.R. §§ 121.419, 121.434, 121.427(d), 121.433, 121.440, and 121.441. Clark submitted written reports, dated November 2000 and January 2001, to Pace management concerning Pace pilots who failed to observe FAA-approved standard operating procedures and who engaged in unsafe flight practices (Comp. Br. 54; CX 21, 22; FoF ¶¶ 16, 17). Both memos were directed to Pace management and both reported violations of FAA standards and/or regulations. The submission of these memos constitutes protected activity under the Act. 49 U.S.C. § 42121(a)(1).

On his last day working for Pace, Clark submitted a written report describing Capt. Watkins' alleged deficiencies during an earlier flight (FoF ¶ 78; CX 31). As fully discussed above, this description of alleged flight deficiencies falls short of the direct implication of safety necessary to be considered protected activity. *American Nuclear Resources, Inc.*, 134 F.3d at 1296; 49 U.S.C. § 42121(a)(1) (2002).

Employer's Knowledge of Protected Activity

In *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004), the ARB stated that an element of an AIR 21 whistleblower case is that the employer knew about the protected activity. The Board wrote:

Knowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. *Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996) (ERA employee protection provision). This element derives from the language of the statutory prohibitions, in this case that no air carrier, contractor, or subcontractor may discriminate in employment 'because' the employee has engaged in protected activity. 49 U.S.C.A. § 42121(a). Section 519 provides expressly that the element of employer knowledge applies even to circumstances in which an employee 'is about to' provide, or cause to be provided, information about air carrier safety or 'is about to' file, or cause to be filed, such proceedings. 49 U.S.C.A. § 42121(a)(1) and (2); H.R. Conf. Rep. No. 106-513, at 216-217 (2000), *reprinted in* 2000 U.S.C.C.A.N. 80, 153-154 (prohibition against taking adverse action against an employee who provided or is about to provide (with any knowledge of the employer) any safety information).

Slip op. at 10.

Each incident of protected activity discussed above was communicated directly to Pace management either as an internal communication or through notification from the FAA.

a. October 2001 FAA Complaint.

In October 2001, Clark placed a call to the FAA hotline regarding his training and maintenance concerns (FoF ¶ 54). Capt. Shue, Pace's Manager of Training, responded to the hotline call on Pace's behalf (FoF ¶ 55).

b. The February 2002 Duty Time Violation.

In response to a duty time violation by Clark and Capt. Holt (FoF ¶¶ 62-64), Clark contacted Pace Chief Pilot Turner and Director of Safety Cobert (FoF ¶ 65). Both

pilots then submitted external NASA reports self-disclosing the FAA violation (FoF ¶ 66).

c. Removal of Emergency Procedure from Aircraft Manuals.

Clark became aware of an unauthorized deletion from the Flight Standards Manual when a warning light activated during a passenger flight indicating a failure in the cargo fire suppression system (FoF ¶ 60). The applicable procedure for handling the warning light had been removed from the Quick Reference Handbook and the Flight Standards Manual (FoF ¶ 60).

Clark reported the problem to Pace Chief Pilot Turner and to Director of Safety Cobert (FoF ¶ 61). Cobert issued an urgent memo on Pace's behalf to deal with the problem (FoF ¶ 61).

d. Violations of Check Airman Requirements.

On January 4, 2001, Clark issued a memorandum to all check airmen regarding check airman responsibilities and deficiencies in full compliance (FoF ¶ 18; CX 25). This memo was a PIDA memo, indicating that it was circulated to all Pace managers (FoF ¶ 13).

e. March 6, 2001 Memo regarding New York Operations.

When recurring safety concerns at the New York operation persisted, Pace Director of Operations Zehner requested that Clark put the problems in writing as a stimulus to corrective action (FoF ¶ 28). On March 6, 2001, Clark sent a letter to Zehner detailing noncompliance and safety problems with the New York operation (FoF ¶ 28; CX 14).

f. Discussion with Zehner and Hopkins over New York Line Check.

In March 2001, Clark received a report about a pilot for the New York operation that gave him serious safety concerns, and Clark scheduled a line check that he would perform as check airman (FoF ¶ 27). Clark discussed the report concerning the pilot and the safety concerns generated by the report with Pace Managers Hopkins and Zehner (FoF ¶ 27).

g. Weight and Balance Procedure Memoranda.

In January and February 2001, Clark circulated three memoranda stressing the need to comply with mandatory weight and balance procedures and noting noncompliance (FoF ¶ 13; CX 10-

12). Those communications were PIDA memos, indicating that they were sent by e-mail to all Pace management (FoF ¶ 13).

h. Other Flight Standard Violations.

Clark issued two additional memoranda reporting FAA violations of various flight standards (CX 13 (March 3, 2001); CX 14 (March 6, 2001)). These memoranda were sent to Pace Director of Operations Zehner.

i. Pilot Training Memorandum.

Clark submitted written reports dated November 2000 and January 2001 to Pace management concern Pace pilots who failed to observe FAA-approved standard operating procedures and who engaged in unsafe flight practices (FoF ¶¶ 16, 17; CX 21, 22).

Pace had knowledge of each incident of protected activity.

Adverse Employment Action

The Complainant must demonstrate by a preponderance of the evidence that he suffered an adverse employment action. The regulations define an adverse employment action to include an employer's acts to "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee." 29 C.F.R. § 1979.102(b) (2002).

The Complainant contends that he suffered an adverse employment action when he was terminated from his employment with Pace Airlines, Inc., on June 26, 2002 (Comp. Br. 1). The Respondent concedes that Clark suffered an adverse employment action concerning a term or condition of his employment when he was terminated by Pace (Resp. Br. 19). I find that the Complainant suffered an adverse employment action when his employment was terminated at Pace on June 26, 2002.

Protected Activity as a Contributing Factor
in Adverse Employment Actions

The Complainant has proven by a preponderance of the evidence that he engaged in protected activity under the Act, that Pace was aware of those protected activities, and that he suffered an adverse employment action. Finally, the Complainant must demonstrate, by a preponderance of the evidence, that his protected activity was a contributing factor in the adverse employment action suffered. See 49 U.S.C. § 42121(b)(2)(B)(iii) (2002); 29 C.F.R. § 1979.109(a).

Like most cases of discrimination or retaliation, this case lacks a "smoking gun." See *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 48 (3rd Cir. 1989). A complainant need not have any specific knowledge of discriminatory intent, however, as the link between protected activity and adverse action may be established through circumstantial evidence. See *Fraday v. Tennessee Valley Authority*, 1992-ERA-19 and 34, slip op. at 10 n. 7 (Sec'y Oct. 23, 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (6th Cir. 1983).

Where a complainant's allegations of retaliatory intent are founded on circumstantial evidence, the fact finder must carefully evaluate all evidence pertaining to the mindset of the employer and its agents regarding the protected activity and the adverse action taken. *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Id.* at 5.

Retaliatory intent may be expressed through "ridicule, openly hostile actions or threatening statements." *Id.* at 5. In determining whether retaliation has taken place, it is also relevant to look at past practice of the employer to determine whether there has been disparate treatment.

The Complainant argues that his protected activity contributed to the Respondent's adverse employment action in four ways: 1) Pace engaged in a consistent and longstanding pattern of discrimination against Clark arising from his efforts to enforce safety compliance; 2) the individuals who participated in the decision-making process leading to Clark's termination had a history of hostility towards him over safety matters; 3) Pace deviated from its written employment policies and procedures; and, 4) Pace discriminated against Clark in comparison to its treatment of other Pace pilots (Comp. Br. 56).

The Respondent argues that Clark's protected activity ceased when he resigned his safety-related position and became a line pilot in March 2001 (Resp. Br. 19). Pace asserts that as Clark was not terminated until 15 to 16 months after the protected activity took place, there is no connection between the protected activity and the adverse employment action (Resp. Br. 19-20).

- 1) Pace's alleged pattern of discrimination arising from Clark's protected activity.

Clark argues that an inference of retaliatory motive is supported by multiple instances of protected activity temporally proximate to the adverse employment action (Comp. Br. 56). Clark alleges that he engaged in protected activity throughout his two years at Pace, up to and including the last day he reported for work (*Id.*; CX 30, 31). Clark's argument is two-fold: first, that there are multiple examples of temporally proximate protected activity in the days and months proceeding his termination and second that there was a pattern of ongoing protected activity accompanied by discriminatory consequences which further supports the inference of retaliatory motive by Pace (Comp. Br. 57).

- a) Temporally proximate protected activity.

The Secretary has noted that one factor to consider is the temporal proximity of the subsequent adverse action to the time the respondent learned of the protected activity, when addressing the complainant's proof of a *prima facie* case. *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 and 8 (Sec'y Mar. 4, 1996); *Conway v. Valvoline Instant Oil Change, Inc.*, 91-SWD-4 (Sec'y Jan. 5, 1993). "Findings of causation based on closeness in time have ranged from two days (*Lederhaus v. Donald Paschen & Midwest Inspection Service, Ltd.*, 91-ERA-13 (Sec'y Oct. 26, 1992), slip op. at 7), to about one year (*Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993))." Temporal proximity may be a factor in showing an inference of causation; however, a lack of it also is a consideration, especially if a legitimate intervening basis for the adverse action exists. *Evans v. Washington Public Power Supply System*, 95-ERA-52 (ARB July 20, 1996) (citing *Williams v. Southern Coaches, Inc.*, 94-STA-44 (Sec'y Sept. 11, 1995)). In *Tracanna v. Arctic Slope Inspection Service*, ARB No. 98-168, ALJ No. 1997-WPC-1 (ARB July 31, 2001), the ARB held that temporal proximity did not always provide a reasonable inference of discrimination:

When two events are closely related in time it is often logical to infer that the first event (e.g. protected activity) caused the last (e.g. adverse action). However, under certain circumstances even adverse action following close on the heels of protected activity may not give rise to an inference of causation. Thus, for example, where the protected activity and the adverse action are separated by an intervening event that *independently* could have caused

the adverse action, the inference of causation is compromised. Because the intervening event reasonably could have caused the adverse action, there no longer is a logical reason to infer a causal relationship between the activity and the adverse action. Of course, other evidence may establish the link between the two despite the intervening event. As the court held in *Farrell v. Planters Lifesavers Co.*, 206 F.3d 271, 279 (3rd Cir. 2000), 'we have ruled differently on this issue [raising an inference of retaliatory motive based on temporal proximity] ... depending, of course, on how proximate the events actually were, and the context in which the issue came before us.'

Slip op. at 7-8 (footnote omitted) (original emphasis).

To be temporally proximate to Clark's termination, therefore, the protected activity would need to be within the last year of Clark's employment, or subsequent to approximately June 2001. That cut-off date precludes any protected activity that took place while Clark was Standards/Fleet Manager, where he had a direct management safety role at Pace. Clark resigned his management role in May 2001 to become a floater pilot (FoF ¶ 39). Under the articulated one-year standard, *Thomas, supra*, the following are temporally proximate protected activities:

- The Duty Time Violation and subsequent internal reports and external NASA filings (February 2002) (FoF ¶¶ 62-67);
- The Emergency Procedure removal and subsequent reports by Clark (February 2002) (FoF ¶¶ 60);
- Clark's FAA Hotline complaint regarding training deficiencies (October 2001) (FoF ¶¶ 54).

Clark presents temporally proximate protected activity from October 2001 through February 2002. Pace argues, however, that The NORDO flight of Pace 111 on June 26, 2002 presents an intervening event that provides an independent basis for Clark's termination (Resp. Br. 20). Pace asserts that:

Clark, as the pilot in command of Pace 111, a Boeing 737 full of passengers, flew for thirty-five to forty minutes through one of the busiest air corridors in the United States without making any contact with air traffic control. ... Clark flew NORDO for such a length of time and distance that, given post-9/11 security

concerns, an order to launch F-16 fighter jets to intercept Pace 111 was moments away from being made. ... In these circumstances, the only possible way for Pace to do wrong would have been to fail to terminate Clark.

(Resp. Br. 20).

Pace offers a legitimate, nondiscriminatory basis for Clark's termination. In asserting the NORDO flight as the sole reason for Clark's termination, Pace's "burden is one of production, not persuasion." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 509 (1993). The respondent need not persuade the Court that it was actually motivated by the proffered reason. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978). "The defendant must clearly set forth, through the introduction of admissible evidence, reasons for its actions which, *if believed by the trier of fact*, would support a finding that unlawful discrimination was not the cause of the employment action." *Hicks*, 509 U.S. at 507 (*citing Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981)) (original emphasis).

Pace extensively detailed the events surrounding Pace 111 and its decision-making process in investigating the incident and terminating Clark (FoF ¶¶ 79-128). I find that Pace has successfully met its burden of production and that the NORDO flight of Pace 111 is a legitimate intervening event that independently could have caused Clark's termination. As such, I find that the temporal link between the protected activity cited above and Clark's termination is severed by the intervening event of Pace 111 on June 21, 2002. The temporal proximity of the protected activity to Clark's termination cannot satisfy Clark's *prima facie* burden.

b) Pattern of protected activity and ongoing discriminatory consequences.

Clark argues that a link between protected activity and his termination is reinforced by a consistent pattern over time in which Clark complained of safety violations and suffered discriminatory consequences from Pace (Comp. Br. 57).

Pace argues that the problems Clark encountered regarding his protected activity was caused by the messenger, Clark himself, and not with the message, safety at Pace airlines (Resp. Reply Br. 3).

While an intervening event may compromise a temporally proximate link between protected activity and adverse employment action, "other evidence may establish the link between the two despite the intervening event." *Tracanna*, 1997-WPC-1 at 7-8. A pattern of criticism and ongoing antagonism may be enough to establish such a causal link. See, e.g., *Hunt-Golliday v. Metropolitan Water Reclamation District*, 104 F.3d 1004, 1014 (7th Cir. 1997) (finding pattern of criticism and animosity by supervisors following protected activity supports the inference of a causal link between protected activity and adverse employment action); *Jaudon v. Elder Health Care, Inc.*, 125 F. Supp. 2d 153, 165 (D. Md. 2000) ("[i]ndeed, temporal proximity and 'ongoing antagonism' may be a sufficient basis for a causal link."). "Antagonism toward activity that is protected ... may manifest itself in many ways, e.g., ridicule, openly hostile actions or threatening statements." *Lawson*, 2002-AIR-6 at 32 (quoting *Timmons*, 95-ERA-40 at 5). Antagonism and disparaging remarks, however, must be made by employees who were involved in the decision to terminate the employee; general complaints regarding safety-related activities by non-decision making employees are insufficient. *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 516 (9th Cir. 1989).

Clark argues that Pace exhibited a general pattern of discriminatory conduct demonstrated through resistance to safety related proposals (Comp. Br. 57). Clark was hired in April 2000 to bring Pace into compliance with FAA-mandated administrative procedures and standard operating procedures through the development and initiation of required standard operating procedures and through training and observance of pilots executing these procedures as a check airman (FoF ¶ 9). The very nature of his position at Pace, as a manager hired to adopt new policies and to implement change, involved the necessary conflict inherent in changing poor, inconsistent, noncompliant behavior by Pace pilots into FAA-compliant behavior. Zehner acknowledged this inherent conflict in his memo to the FAA, stating that Clark was working to bring the airline into compliance and that Clark "required that these practices and procedures be followed as much as possible in order to maintain our safety and compliance," and he described Clark's job as "very difficult" and "thankless."

Zehner's FAA memo, however, stresses Pace management's support of Clark's initiatives, not resentment or antagonism. Clark produced no memorandum or documentation showing resistance by Pace management to Clark's safety proposals (FoF ¶ 20). Clark then offered specific incidents of alleged discriminatory conduct by Pace.

i) Weight and Balance Procedures.

Clark argues that he encountered resistance to his weight and balance procedure (Comp. Br. 57; FoF ¶¶ 13-14). Hopkins, however, credibly addressed resistance to Clark's procedure, explaining that Pace was fully supportive of weight and balance procedures, but that Clark's *particular* procedure was cumbersome and difficult to use (FoF ¶¶ 13, 14). While Clark's procedure was technically accurate, "there were better procedures that were simpler, that were more effective, and arrived at just as safe conclusion for weight and balance operations than the one Mike [Clark] had prepared." (*Id.*). Clark has failed to establish that resistance to the weight and balance procedure was due to unwillingness by Pace management to follow required procedures, nor has he shown antagonism by Pace management towards Clark regarding following required procedures. The resistance demonstrated by Clark focuses on the details of *how* to comply with weight and balance and not with *whether* to comply with weight and balance requirements, nor is the resistance directed towards Clark as a person.

ii) The Exchange with McPhail.

Clark argues that Pace's Manager of Marketing angrily exchanged words with Clark over the extent of the pilot training requirements (Comp. Br. 58). In *Lockert*, several employees made disparaging remarks about the complainant's safety-related activities and complaints. 867 F.2d at 516. The Court noted that, with the exception of one manager, none of the employees engaging in disparaging remarks about the employee were involved in the decision to discharge the complainant. *Id.* Pace's Manager of Marketing fits a similar role. In an isolated verbal exchange, a manager with no direct relationship with Clark and no employment decision-making responsibilities regarding Clark made disparaging remarks about Clark's training recommendations. There is no evidence that McPhail's comments had any influence on any decision maker involved in personnel actions against Clark. As such, it provides no assistance to Clark in establishing a pattern of discriminatory behavior.

iii) Resistance to the Compliance Matrix.

Clark argues that he encountered widespread resistance when he presented a matrix showing compliance responsibilities to Pace management (Comp. Br. 58; FoF ¶ 12). The matrix presented was ultimately adopted in an edited format, however, and Clark provided no documentation or support for his assertion that Pace management reacted with anger, resentment, and resistance (FoF ¶ 12, 13).

iv) Subject to Verbal Ridicule.

Clark argues that he was the subject of verbal ridicule and that the phrases used to describe him reflect an aversion to his exacting approach to safety compliance (Comp. Br. 58). The record contains ample examples of derogatory phrases used to describe Clark (FoF ¶ 19). Derogatory phrases, without context, however, do not reflect an aversion to safety or retaliation against protected activity.

Clark's job was to bring Pace into compliance with FAA required procedures. A certain amount of both resistance and disparaging remarks by people not following those procedures has to be understood and expected as part of the job. It was Clark's job to overcome that resistance and to bring the airline into compliance which, in general, the record reflects that he was successful (see, e.g., FoF ¶¶ 20, 43, 47). Unless disparaging remarks were made by Pace management personnel who had decision-making power over Clark's employment status (see *Lockert*), and unless those remarks were in regards to Clark's protected activity, then disparaging remarks over compliance issues by general employees should be considered part of the job and must be expected by a manager hired to bring ongoing poor behavior into FAA compliance.

The closest Clark comes to implicating Pace managers in this litany of disparaging remarks is through the testimony of Captain Holt, who testified that Andy Bradford and Mark Shue might have referred to Clark as a "pain in the ass." (FoF ¶ 19). He qualified that declaration, however, stating that he couldn't remember any particular incidents when that comment was actually made and that it "probably" was Andy Bradford and Mark Shue that made the comment (FoF ¶ 19). Clark has not established that he was subject to a pattern of verbal ridicule by Pace management. Clark's specific argument that Turner, Shue, and Cobert had personal animus against Clark will be dealt with below.

v) Removal from New York Operation.

Clark argues that he was removed from the New York operation due to his protected activity (Comp. Br. 58). Pace credibly explained Clark's removal, stating that both Clark's management style in bringing compliance to the New York operation and direct complaints by Madison Square Gardens, the customer, prompted Clark's removal (FoF ¶¶ 29, 30). While Clark claims that he would have received higher pay for flying in New York (Comp. Br. 58), this was not confirmed at trial (FoF ¶ 32). Clark testified that his removal from the New York

operation was not connected to prior safety complaints "in any way that I can think of" (FoF ¶ 31).

vi) Boeing 757 Training.

Clark argues that he was pulled from the Boeing 757 training class in retaliation for his activities in New York (Comp. Br. 58; see FoF ¶ 33, 34). Clark's written protected activity memo on the New York operation was dated March 6, 2001. (FoF ¶ 28). Shortly after Clark was removed from the New York operation, Director of Operations Zehner allegedly informed Clark that he would not be a part of the upcoming training for the 757 (FoF ¶ 34).

In anticipation of 757 crew requirements, Pace issued a March 7, 2001 memorandum addressing the upcoming 757 crew needs (CX 6). In part, that memo stated that:

If you are interested in joining the 757 team, please update your resume and forward it via fax, mail, or email to us. ... We have not yet addressed specifics concerning the 757-crew requirements. However, the Maverick's have told us they look forward to reviewing your resumes for consideration.

(CX 6).

Pace was just starting to consider what crew would be needed for the new 757 when Clark issued his protected activity memo. Clark presented no evidence that he submitted his resume or that the Mavericks expressed any interest in having him as a pilot.

Clark nevertheless testifies that he was told that he and Capt. Gillis would be in the first class to be trained on the 757 (FoF ¶ 34). Specifically, he testified that:

The company needed two pilots to go train on [the 757] and become the first two manager pilots. And they counseled with each other and decided who would - - who could they send that could do their job here and do that as well, and then assimilate it well enough to teach other pilots and building initial - check airmen, and so forth, even though it was new to them. While still being managers and they selected myself and Capt. Gillis, the chief pilot.

(FoF ¶ 34).

In the Pace March 7, 2001 PIDA memo (CX 6), Pace announced that Capt. Gillis was stepping down as chief pilot and as a Pace manager. If Pace was looking for manager pilots to staff and train for the 757, Capt. Gillis disqualified himself before the crew assignments were even considered. Clark's testimony stated that Pace managers wanted a manager and a check airman to lead the 757 program. Clark had resigned his manager position as of May 2001 to become a floater pilot, and his FAA check airman status had been revoked due to a pending FAA investigation from a March 2001 FAA complaint lodged against Clark (FoF ¶ 38).

Clark has failed to establish that he ever applied for the 757 training, that Pace told him that he would be attending that training class, or that Pace then revoked their offer of training on the 757. Had such an offer been made, however, it appears that Clark did not meet his own stated criteria (being a manager and a check airman, see FoF ¶ 34), for being one of the first 757 manager pilots.

vii) Clark's Change to Full-Time Salaried Employee.

Clark argues that his efforts to become a full-time employee were ignored for months (Comp. Br. 58). Zehner's offer of full-time salaried employment shows that Clark had to exercise his option to become a full-time salaried employee no later than July 1, 2000 (FoF ¶ 39; CX 2; RX 2, 3). There was no evidence presented that Clark attempted to exercise his option during that time. Clark did make written requests to become a full-time salaried employee in November 2000 and March 2001, well after the agreed upon cut-off date (FoF ¶ 39). Clark resigned his management/consultant position and became a floater pilot effective May 7, 2001 (RX 4).

viii) Removal from Training Position.

Clark argues that he was removed from training and was no longer able to receive additional instructor pay (Comp. Br. 59; FoF ¶ 48). Pace Manager of Training, Mark Shue, testified that Clark ceased to perform training for Pace when it was determined by Pace management that all training should be conducted by FAA certified check airmen (FoF ¶ 48). Clark's check airman status had been revoked by the FAA pending an investigation (FoF ¶ 48). There is no evidence rebutting Pace's assertion that Pace subsequently restricted training opportunities to FAA certified check airmen, and there is no dispute in the record that Clark no longer met Pace trainer requirements due to the revocation of his check airman status by the FAA.

ix) Change of Base from Indianapolis to Cincinnati.

Clark alleges that he was promised a floater position with an Indianapolis base in May 2001 (CX 19), and that he was soon reassigned to a Cincinnati base, forcing him to incur additional commuting costs (Comp. Br. 59; FoF ¶ 39). Clark stated on his employment application that he was willing to relocate as part of his job with Pace (RX 4). He agreed that Pace could change the conditions of his employment at any time (RX 4). Clark presented no evidence that his base reassignment was related in any way to his protected activity.

x) Promised Performance Evaluation.

Clark states that he was promised a favorable performance evaluation (Comp. Br. 59; FoF ¶ 39). Clark's employee records show that he was transferred from consultant to pilot on May 7, 2001, and that his first performance appraisal was scheduled for May 1, 2002 (FoF ¶ 39; RX 4, 00010). Clark was terminated from Pace on June 26, 2002, without having received the scheduled May 2002 performance appraisal. Clark has presented no evidence, however, that Pace management's missed performance appraisal of Clark was motivated by his protected activity. As such, it offers no support for a pattern of discriminatory activity. See, e.g., *Jones v. United States Enrichment Corp.*, ARB Nos. 02-093, 03-010, ALJ No. 01-ERA-21, slip op. 9 (ARB April 30, 2004) (holding that even if the employer's managers did a poor job of supervision, the employee failed to demonstrate that any lack of supervision was motivated by the employee's protected activity).

xi) Shortage in Paychecks.

Clark argues that he was shorted tens of thousands of dollars in pay during his time with Pace (Comp. Br. 59; CX 28, 29). Clark documents only about \$2400 in alleged unpaid expenses and pay, and acknowledges that "I have received some checks which appear to be partial back payments, but which have no explanation or notation of purpose." (CX 28). The record does not support any other shortages, and the record is unclear whether Clark was owed additional monies or if the checks received by Clark were sufficient to cover the backpay accrued. Clark did not file a wage and hour suit or a report with the Department of Labor regarding payroll shortages (FoF ¶ 136).

Taken as a whole, Clark has failed to show a pattern of resistance by Pace management to his safety proposals and other

protected activity, and he has failed to demonstrate a pattern of discriminatory consequences.

2) Did Participants in the Decision-making Process have a History of Friction with Clark over Safety Problems?

Clark argues that Richardson's decision to terminate him cannot be divorced from Capt. Turner, Capt. Shue, and Mr. Cobert, each of whom allegedly had a history of animus towards Clark (Comp. Br. 60).

Pace argues that Richardson alone made the decision to terminate Clark, and that he was unaware of Clark's protected activity when he made the decision (Resp. Br. 22).

In evaluating the liability of an employer under the acts, we are guided by agency principles. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754, 118 S.Ct. 2257, 141 L.Ed. 2d 633 (1998). The discrimination statutes, however, do not make employers vicariously liable for the discriminatory acts and motivations of everyone in their employ, even when such acts or motivations lead to or influence a tangible employment action. *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 72, 106 S.Ct. 2399, 91 L.Ed. 2d 49 (1986); see also, *Faragher v. City of Boca Raton*, 524 U.S. 775, 790-792, 118 S.Ct. 2275, 141 L.Ed. 2d 662 (1998). When reviewing adverse employment actions, the Fourth Circuit has held that:

An employer will be liable not for the improperly motivated person who merely influences the decision, but for the person who in reality makes the decision. This encompasses individuals who may be deemed actual decisionmakers even though they are not formal decisionmakers... In sum ... an employee who rests a discrimination claim ... upon the discriminatory motivations of a subordinate employee must come forward with sufficient evidence that the subordinate employee possess such authority as to be viewed as the one principally responsible for the decision or the actual decisionmaker for the employer.

Hill v. Lockheed Martin Logistics Management, Inc., 354 F.3d 277, 291 (4th Cir. 2004).

Fair adjudication of whistleblower complaints requires "full presentation of a broad range of evidence that may prove, or disprove, retaliatory animus and its contribution to the adverse action taken." *Timmons v. Mattingly Testing Services*, 1995-ERA-40 (ARB June 21, 1996). Retaliatory intent may be

expressed through "ridicule, openly hostile actions or threatening statements." *Id.*

To prevail on a vicarious liability theory, therefore, Clark must first prove that Capt. Turner, Capt. Shue, and/or Mr. Cobert had a discriminatory motivation, and then must prove that the managers with discriminatory motivation were the actual decisionmakers in regards to Clark's termination. Clark can meet neither burden.

a) Chief Pilot Turner.

Clark lists a number of incidents involving Chief Pilot Turner, which Clark asserts show a history of animus towards Clark and his protected activity (Comp. Br. 60). Turner testified that he has never had a grudge against Clark (FoF ¶ 120).

Captain Turner was described as "disdainful" towards standard operating procedures by Ron Adams, a former Pace pilot (FoF ¶ 120). Clark alleges that Capt Turner conceded that Clark was disliked because of his insistence on following standard operating procedures (FoF ¶ 120). Turner testified that "[y]ou've got to have good standard operating procedures but ... it's the way [Clark] goes about presenting them to people. People resent it." (FoF ¶ 120). Capt. Jordan testified that Turner had expressed one time before May 2001 (when Clark was still Manager of Flight Standards) a desire to "get rid of [Clark] as soon as I can." (FoF ¶ 120).

During a simulator session, Clark was performing the correct emergency procedure when Capt. Turner insisted upon deviating from that procedure (FoF ¶ 41). Turner testified that under the simulator conditions presented, he "felt like we were in survival mode" and he differed in opinion from Capt. Clark as to what was required to correct the problem (FoF ¶ 41).

Common sense dictates that the purpose of a simulator is to experience emergency conditions in a controlled environment that doesn't risk lives or aircraft to work out exactly those types of problems. Although the record reflects a difference in opinion between Clark and Turner, there was no evidence presented as to how the matter was resolved. A difference of opinion on how to handle an emergency may implicate flying abilities, crew communications, and a host of other legitimate concerns, but there is no evidence presented that it created an animus between Clark and Turner related to Clark's protected activity.

Turner spoke out against Capt. Clark at the time he went from being a consultant to a salaried employee in May 2001 (FoF ¶ 39). Turner testified that he "did not feel that Mike [Clark] was good for the company." (FoF ¶ 39). Turner had never flown with Clark on the line, but numerous pilots had complained about Clark and stated that he was hard to talk to (FoF ¶ 39). Turner testified that his recommendation was not in any way influenced by any concerns that Clark may have expressed about safety (FoF ¶ 39).

Turner, in fact, recommended against additional punishment from Pace after Clark's check airman status had been suspended by the FAA over the insufficient fuel incident (Resp. Reply Br. 67). Pace asserts that if Turner had a bias against Clark, he would not have passed up an opportunity presented to him to discipline or terminate Clark over the incident (*Id.*).

In reviewing the full range of evidence presented in the relationship between Clark and Turner, there is no credible evidence of discriminatory motivation by Turner towards Clark. There is no history of ridicule, openly hostile actions or threatening statements in the record. While Turner did not feel that Clark was a model employee, the comments attributed to him are either denied by Turner, himself, or only offered into the record by Clark as second hand accounts of past incidents.

The simulator incident was a difference in opinion only, and Clark presented no evidence that the simulator incident had any bearing on Clark's protected activities or Turner's recommendation to Richardson to have Clark terminated.

Jordan testified that Turner wanted to get rid of Clark, but that statement was made over a year before Clark was terminated. Likewise, Turner's recommendation against Clark becoming a full-time employee was made over a year before Clark was terminated. The record further reflects that Turner's decision not to recommend Clark for full-time salaried employment was based on complaints from other pilots and not from Clark's protected activities.

Finally, Pace correctly points out that Turner recommended against Pace disciplining Clark for the low fuel incident. Had animus truly been present, Turner would likely not have passed up a golden opportunity from the FAA to punish Clark for the misfueling incident.

The record contains no counseling or disciplinary actions taken by Turner towards Clark on any subject, and no history of ridicule or openly hostile actions taken by Turner in response

to protected activity. Clark has not established animus on the part of Turner.

b) Director of Operations Shue.

Clark alleges that Shue's discriminatory animus stemmed at least in part from the disagreement between Clark and Shue over Shue's required completion of the 737-300 ground school before proceeding to simulator training (Comp. Br. 61; see FoF ¶ 41). Capt. Shue acknowledged the incident and admitted that he disagreed and was upset with Clark's insistence on making up the missed items (FoF ¶ 41). When Zehner and Turner instructed Shue to complete the ground school, Shue complied (FoF ¶ 41). Clark presents no evidence, however, that this event was related to any of Clark's protected activity.

Clark states that Capt. Shue resisted use of the FAA approved SOP's (FoF ¶ 20). Shue denied that allegation (FoF ¶ 20). No evidence was presented that demonstrated Shue's resistance to SOP's or that connected Shue's alleged resistance to Clark and his protected activities.

Capt. Jordan testified that Shue announced during a break during ground school that he was going to get rid of Clark and mentioned the misfueling incident as the reason (FoF ¶ 119). Capt. Shue denied that allegation (FoF ¶ 119). The misfueling incident took place in March 2001, 15 months before Clark's termination. There was no evidence presented that Clark was disciplined or counseled in any way by Shue regarding the misfueling incident.

Shue allegedly taunted Clark about the FAA hotline complaint alleging falsification of training records by teasing Clark that Clark might alert the FAA if they took a break (FoF ¶ 119). Capt. Shue denied this allegation (FoF ¶ 119).

Capt. Shue allegedly told Mr. Wood that he took exception to pilots writing up problems in logbooks (FoF ¶ 119). Capt. Shue denied that allegation (FoF ¶ 119). There was no evidence presented, however, that Shue influenced pilots not to write up problems, that Clark was aware of Shue's alleged feelings on the logbook issue, or that Shue was aware and/or was upset by Clark's compliance with logging equipment malfunctions.

Unlike the statements allegedly made by Turner, the comments made by Shue were corroborated by the direct testimony of Capt. Jordan and Mr. Wood. However, in reviewing the evidence presented by Clark, he again fails to establish a history of ridicule, openly hostile actions, or threatening

statements by Shue that would demonstrate a retaliatory animus or discriminatory motivation and its connection to protected activity or its contribution to Clark's termination.

c) Director of Safety Cobert.

Clark argues that Cobert, likewise, had a history of animus towards Clark (Comp. Br. 61).

Clark alleges that when he raised a complaint regarding the improper removal of the emergency procedure from airplane manuals, Cobert exhibited a lack of understanding and a lack of interest (FoF ¶ 61). Cobert testified that he issued an urgent memo on the topic on the same day as it was reported by Clark (FoF ¶ 61; RX 27).

When Clark reported the February 2002, duty time violation, he states that Cobert scoffed at his concerns and said nobody but the two pilots knew about it and nobody is ever going to know about it (FoF ¶ 65). Cobert testified that he advised Director of Operations Zehner that "we needed to file a voluntary self disclosure with the FAA with regards to the event and he advised me at that time he would take care of that." (FoF ¶ 65). When an internal audit showed that the self-disclosure had not taken place, Cobert filed the self-disclosure himself (FoF ¶ 67). Cobert denies that he told Clark that no one would ever find out about the event and he testified that he encouraged Clark to file a NASA report on the event (FoF ¶ 65).

The evidence shows that Cobert issued an urgent memo after Clark reported the missing emergency procedure. There is no evidence that Cobert was mad or upset about the reporting by Clark, and even if Cobert displayed a lack of understanding or disinterest, this does not create an animus regarding Clark and his protected activity. The duty time incident, likewise, is unsubstantiated, and the record shows that it was Cobert who eventually filed the NASA disclosure on the incident. Clark fails to establish a history of ridicule, openly hostile actions, or threatening statements made by Cobert that would prove a retaliatory animus or discriminatory motivation towards Clark's protected activity and its contribution to Clark's termination.

Clark has not argued that Richardson, the formal decisionmaker in Clark's termination, demonstrated a history of animus or discriminatory motivation. As Clark has failed to prove discriminatory motivation or retaliatory animus among the Pace managers who recommended Clark's termination to Richardson, Clark cannot prove a vicarious liability argument showing that

retaliatory animus on the part of managers recommending termination, generated by Clark's protected activity, contributed to the decision to terminate him.

- 3) Pace deviated from its own written employment policies and procedures.

Clark alleges that Pace failed to follow its normal policies and procedures set forth in its employment manual and that, instead, Pace applied an irregular process and took special action against Clark (Comp. Br. 62). He argues that Pace violated its own employment policies in two ways: 1) Clark was denied the opportunity to discuss the circumstances of Pace 111 with the pilots in his chain of command; and, 2) Pace terminated Clark with no progressive discipline (Comp. Br. 62-63).

Precedent developed under the anti-discrimination provisions of the National Labor Relations Act, which is relevant to interpretations of the Federal Environmental Whistleblower Protection Statutes, see S. Rep. No. 414, 92^d Cong., 2d Sess. 80-81 (1972), reprinted in 1972 U.S.C. C.A.N. 3668, 3748-49; *Ewald v. Commonwealth of Virginia*, ALJ No. 1989-SDW-1, slip op. at 8, n. 10 (Sec'y Apr. 20, 1995); *DeFord v. Secretary of Labor*, 700 F.2d 281, 285 (6th Cir. 1983), provides that an employer's failure to follow its own progressive discipline policy is frequently indicative of a hidden, unlawful motive for imposing more severe discipline. See, e.g., *Fayette Cotton Mill*, 245 NLRB 428, 429 (1979); *Keller Mfg. Co.*, 237 NLRB 712, 713-717 (1978); *Taylor Bros., Inc.*, 230 NLRB 861, 868 (1977).

- a) Clark was denied the opportunity to discuss the events surrounding Pace 111 with the pilots in the chain of command.

Clark argues that he was denied the opportunity to discuss the circumstances of Pace 111 with the pilots in his chain of command (Comp. Br. 63). Pace's written employment manual states: "Before being subjected to any discipline, an employee will be given an opportunity to relate his/her version of the incident or problem and provide an explanation or justification." (CX 42B at § 7.2). Pace's written policies do not state that Clark was entitled to discuss the events of Pace 111 with the pilots in his chain of command. The manual only states that he would be given an opportunity to present his version of the incident. The policies cited further do not state that Clark would be given the opportunity to discuss the

matter with Richardson, only that Clark would be given an opportunity to present his version of events.

Clark was given an opportunity to express his version of Pace 111 when he discussed the matter with Cobert on June 21, 2002 (RX 24). Clark followed that June 21, 2002 interview with a June 23, 2002 e-mail to Cobert (RX 15; CX 43). Cobert testified that he "was willing to talk to [Clark] at any time at any length" regarding Pace 111 (FoF ¶ 113). Clark presented no evidence that he attempted to relay any further information to Pace management or that he was prevented from adding to the interview and e-mail already submitted.

Clark argues that Capt. Turner never returned his calls before recommending termination (Comp. Br. 64). Turner testified, however, that he spoke with Clark regarding the Pace 111 circumstances a day or two after the flight and before the recommendation for termination was made to Richardson (FoF ¶ 118).

Pace employee policies do not require that Clark be given the opportunity to present his version of Pace 111 events to every member of management or to the particular pilots in his chain of command. Clark was provided with an opportunity to relay his version of the events surrounding Pace 111, both to Cobert and to Turner, two of the three managers recommending termination. Clark's assertion that Pace failed to follow its employment procedures at § 7.2 is without merit.

b) Pace terminated Clark with no progressive discipline.

Clark argues that Pace's employment manual calls for progressive discipline and that Clark was terminated without prior imposition of a less severe penalty (Comp. Br. 65). Pace's written disciplinary procedures, however, state that "[t]he first occurrence of some forms of misconduct ... may result in termination." (CX 42B, § 7.2). Further,

Employees who commit ... extreme misconduct or serious safety violations will be suspended at the time of the incident, pending a management investigation and review of the matter. ... Employees who are found guilty of the charges will be discharged without delay.

(CX 42B, § 7.2).

Clark argues that because "ATC personnel did not express any safety concern and saw no reason to consider declaring an

emergency ..., Pace's [use of the 'extreme misconduct or serious safety violation' clause] is implausible." (Comp. Br. 65). Pace's disciplinary guidelines are not based upon ATC actions, however, but upon Pace's evaluation of Pace 111 as a serious safety and security breach. The record is clear that Pace management considered Pace 111's NORDO status as an unacceptable safety and security breach (See, e.g., FoF ¶¶ 100, 123, 124, 125, 126).

Clark also argues that Richardson's assignment of Cobert was a departure from the normal progressive discipline process of having direct supervisors investigate incidents involving subordinates (Comp. Br. 63). He is correct, but that departure actually reinforces Pace's view that the NORDO flight of Pace 111 was not a routine matter to Pace management. Pace company policies include an Incident Procedures Manual which specifies a clear process of protocol in notifying management of an incident (FoF ¶ 99). After Pace 111 had been out of radio contact for about 15 minutes, Mark Spence, Manager of System Operations Control, alerted Pace management personnel per the required procedure, including Director of Safety Cobert (FoF ¶ 99). Upon being alerted of the Pace 111 NORDO incident, Cobert testified that:

Once I had a handle on the situation as to what was occurring, and what the aircraft was doing, knowing the [Department of Homeland Security] procedures that were going to shortly be implemented outside of the FAA, I went and advised the president of the company that we had a situation that was fairly serious and in all likelihood, if we couldn't make contact with the aircraft, it was going to be met and diverted [by F-16 fighter jets].

(FoF ¶ 99).

Mr. Spence had delegated authority within Pace to declare a dispatcher emergency (FoF ¶ 100). He notified Cobert that he intended to declare an emergency if contact was not made before Pace 111 entered the Jacksonville ATC center airspace (FoF ¶ 100). Spence was in the process of declaring a dispatcher emergency when contact was re-established with Pace 111 (FoF ¶ 100).

Cobert testified that as liaison with the Department of Homeland Security, he has been given classified security procedures that he is unable to divulge even to the President of Pace (FoF ¶ 110). Cobert noted that the Pace 111 NORDO event was particularly alarming to him because the 9/11 hijackings

started with a loss of radio contact with the planes, and all of the hijacked flights stayed on their designated flight paths until the last few minutes of their flights (FoF ¶ 110). While Atlanta ATC personnel did not express a safety concern to Cobert, they did express a security concern (FoF ¶ 117).

Richardson testified that he felt the NORDO incident was a serious breach of safety and security and that he would have terminated any pilot who acted in this manner (FoF ¶ 126).

Contrary to Clark's position, Pace followed its progressive discipline employment guidelines. Over a five-day period between June 21 and June 26, 2004, Clark was suspended for an alleged serious safety violation, an investigation was conducted, Clark was given a chance to relay his version of the incident and to provide explanation and justification, he was found guilty of the charges made against him, and he was terminated immediately.

4) Disparate Treatment of Similarly Situated Employees.

Clark argues that: 1) he was terminated for the events surrounding Pace 111 while Holt and Watkins were not disciplined; and, 2) he was terminated while other pilots who committed egregious safety infractions were not terminated (Comp. Br. 66).

"When disciplinary action, including termination from employment, is involved, the past practice of the employer in similar situations is relevant to determining whether there has been disparate treatment, which may provide highly probative evidence of retaliatory intent." *Lawson*, 2002-AIR-6 at 32 (quoting *Timmons*, 95-ERA-40, at 7-8).

a) Disparate Treatment from Holt and Watkins.

Holt was the co-pilot on Pace 111 and he was specifically assigned the task of communicating with ATC during the flight (FoF ¶ 115). Clark argues that he was terminated while Holt, who operated the radio during the NORDO event, was not required to submit to a drug test, was not disciplined in any way, and was soon promoted to Captain (Comp. Br. 66).

This argument flies in the face of Clark's earlier assertion that the captain of the flight is responsible for all aspects of the flight (Comp. Br. 48). As stated by Clark:

Several FAA regulations define the authority of the pilot-in-command. See 14 C.F.R. § 91.3(a) (pilot-in-

command is 'final authority' on operation of the aircraft); *id.* § 121.537(d) (pilot-in-command has 'full control and authority' over operation of aircraft and over other crewmembers); *id.* § 121.537(e) (authority extends to preflight planning). A clearly defined chain of command, after all, promotes safety by preventing conflict in operational decisions.

(Comp. Br. 48).

Clark testified that the Captain is the person who is ultimately held responsible for what occurs on an aircraft (FoF ¶ 102). The regulatory standard that the Captain is the responsible party on the aircraft for all problems is reinforced by the testimony of Capt. Holt, Capt. Jordan, Capt. Turner, Capt. Shue, Director of Safety Cobert, Pace President Richardson, and even Clark's expert witness Edward Malone (FoF ¶ 102).

Under the standard articulated by the regulations and Clark, himself, he was the responsible party for the NORDO event on Pace 111. As first officer of Pace 111, Holt was not a similarly situated employee as Clark, the captain of the flight. As such, there is no disparate treatment between Clark and Holt.

Clark argues that Watkins was the other pilot involved in the events surrounding Pace 111, and that she was neither disciplined nor counseled in regards to that flight, while Clark was terminated (Comp. Br. 66). Watkins was transferred at Clark's request to the other Pace flight bound for Sanford, Florida (FoF ¶ 75). She was not on board Pace 111 during the NORDO incident, nor was she a captain on either flight. Watkins was not similarly situated to Clark, and therefore, there is no disparate treatment between Watkins and Clark.

Clark has failed to establish disparate treatment between similarly situated pilots involved with Pace 111.

b) Clark was Treated Differently than Other Pilots who Committed Serious Safety Violations.

Clark's final argument is that Pace tolerated other pilots' egregious safety infractions but terminated Clark for the June 21, 2002 NORDO event (Comp. Br. 66).

Clark cites by example a past situation in which a falsified weight and balance form led to a hazardous high-speed takeoff, yet neither pilot was terminated by Pace (Comp. Br. 67; Tr. 150, 444-46). The record does not provide the date of the

flight, the flight number, the type of aircraft, the names of the pilots involved, or employment records verifying either that the incident actually took place or any alleged disciplinary action taken or not taken by Pace regarding this alleged safety infraction. It is an unverified, secondary account of a possible safety incident and it offers no support for Clark.

Clark alleges that "[o]ther Pace pilots blew cars end over end by turning an airplane too near a parking area, yet were not terminated or even disciplined." (Comp. Br. 67; Tr. 151, 447-49, 469-70). This event suffers the same deficiencies as the alleged high speed takeoff. While the pilots were named (Tr. 469), the date of the flight, the flight number, the type of aircraft, and the employment records are not in the record to substantiate the incident or a lack of disciplinary action. Capt. Jordan testified that he could not even state for a fact that the incident had actually occurred, whether there was any explanation for the event if it did occur, and that he did not view any reports or records concerning the alleged incident (Tr. 470). This is another unsubstantiated, unverified incident which offers Clark no support for his position.

Clark argues that "Pace pilots who struck buildings and light poles with airplanes were not terminated or disciplined." (Comp. Br. 67; Tr. 151, 446-47, 468-69). This alleged event again suffers the same deficiencies as the first two incidents and it offers no support for Clark's position.

Even assuming, *arguendo*, that the incidents cited by Clark actually occurred and that the pilots were not disciplined for their actions, Clark can still not demonstrate disparate treatment. The incidents cited above were different from Clark's situation. First, the cited incidents were safety issues involving taxiing or aborted takeoffs on the ground, while Pace 111 involved an in-flight safety issue. More importantly, however, Clark was the captain of Pace 111, a plane which flew NORDO through the entire Atlanta ATC area. This incident caused a security breach so serious that Pace was in the process of declaring an emergency and F-16 jets were about to be scrambled to intercept the flight. None of the events cited by Clark initiated a similar response.

Simply put, Clark is not similarly situated to other Pace pilots because no one at Pace has ever flown NORDO for that period of time before. Clark is unique in his predicament. Tracy Collins, Operations Manager for Atlanta ATC, testified that in her experience, no other aircraft had ever flown NORDO through the entire airspace of the Atlanta center (FoF ¶ 89). Mark Spence, Pace flight follower, testified that in his 27

years as a dispatcher and flight follower, Pace 111 was the only aircraft which flew NORDO for this length of time (FoF ¶ 103). Simply put, Clark created a security and safety incident that was unprecedented in Pace history. Clark was not similarly situated and Pace, therefore, did not take disparate action regarding similarly situated employees.

CONCLUSION

Complainant has failed to demonstrate, by a preponderance of the evidence, that his protected activity was a contributing factor in the adverse employment action suffered. See 49 U.S.C. § 42121(b)(2)(B)(iii); 29 C.F.R. § 1979.109(a). It is unnecessary, therefore, to proceed to the next stage of proof, whether Pace demonstrated by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of Clark's protected activity. *Peck v. Safe Air International, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3, slip op. 13 (ARB Jan. 30, 2004); 49 U.S.C. § 42121(b)(2)(B)(iv). It is my conclusion, therefore, that Michael R. Clark was not disciplined or discriminated against for any activities protected by the Act.

ORDER

It is hereby ORDERED that the Complaint of Michael R. Clark is DENIED.

A

Robert L. Hillyard
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, N.W., Washington, D.C., 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions, or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten (10)

business days of the date of the decision of the Administrative Law Judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery, or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, D.C., 20210. See 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century; Final Rule, 68 Fed. Reg. 14099 (Mar. 21, 2003).